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No. 328

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IN THE

Supreme Court of the United States

October Term, 1967

LESTER C. NEWTON TRUCKING COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Appellees.

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1967

No. ———

LESTER C. NEWTON TRUCKING COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Appellees.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the District of Delaware, entered March 29, 1967, dismissing a Complaint seeking to set aside orders of the Interstate Commerce Commission. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The Opinion of the District Court for the District of Delaware is reported in 264 F. Supp. 969. The Opinions of the Interstate Commerce Commission are recorded in 84 M.C.C. 759, 89 M.C.C. 269 and 96 M.C.C. 702. Copies of the Opinion of the Court below, as well as the Exam-

iner's Report and all Commission decisions, are reproduced in a separate Appendix accompanying this Jurisdictional Statement.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to set aside orders of the Interstate Commerce Commission (hereinafter "the I.C.C." or "the Commission"). The judgment of the District Court was entered on March 20, 1967, and notice of appeal was filed in that Court on May 4, 1967. The jurisdiction of the Supreme Court to review the judgment below by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States, et al* v. *Carolina Freight Carriers Corporation*, 315 U.S. 475; *Willis Shaw Frozen Express, Inc.* v. *United States et al.*, 377 U.S. 159.

QUESTIONS PRESENTED

1. Did Section 7(b) of the Transportation Act of 1958 confirm the right of motor carriers holding certificates authorizing the transportation of property made subject to regulation by Section 7(a) of the 1958 Act to continue to transport such property?

2. If so, can a carrier holding certificates authorizing the transportation of all exempt property prior to the 1958 Act properly be found thereafter not to hold certificates embracing frozen fruits, frozen vegetables and frozen berries made subject to regulation by Section 7(a) of the 1958 Act?

3. May the Commission validly determine a carrier's "grandfather" application under Section 7(c) of the 1958 Act and a contemporaneous application under Section

207 of the Interstate Commerce Act covering the transportation of frozen fruits, frozen vegetables and frozen berries, based upon:

a) Misinterpretation of the carrier's existing certificates as not embracing the commodities involved;

b) Limitation of consideration of the territorial nature and characteristics of the transportation service involved to a small portion of the actual territory involved;

c) A finding that the services of other existing carriers are not inadequate to meet the needs of the involved shippers and receivers?

STATUTES INVOLVED

Sections 203(b)(6) and 207(a) of the Interstate Commerce Act, 49 U.S.C., §§ 303(b)(6), 307(a); and Section 7 of the Transportation Act of 1958 (72 Stat. 573), are set forth in Appendix A hereto.

STATEMENT

Appellant, plaintiff below, is a common carrier of freight by motor vehicle operating in interstate commerce. This action was brought in the Court below to suspend, set aside and permanently enjoin orders of the Commission, dated April 28, 1961, May 10, 1962, and May 19, 1965, insofar as those orders implement restrictive interpretation of Appellant's existing certificates and deny operating authority sought by Appellant under Section 7(c) of the Transportation Act of 1958 (72 Stat. 573) and Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)).

(1) Statutory Background

Prior to the Transportation Act of 1958, Section 203(b)(6) of the Interstate Commerce Act, as amended,

49 U.S.C. § 303(b)(6), exempted from the Commission's economic regulation:

> [M]otor vehicles used in carrying property consisting of . . . agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation;[1]

Because of the provisional character of this so-called "agricultural exemption", the Commission in circumstances deemed appropriate issued certificates and permits authorizing the transportation of unmanufactured agricultural commodities.[2]

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[1] The language of the quoted portion of the statute was amended only twice after initial adoption of the Motor Carrier Act, 1935. Public Law No. 255, 74th Cong., August 9, 1935, Ch. 498, 49 Stat. 543. An amendment in 1938 added the clauses "property consisting of" and "if such motor vehicles are not used in carrying any other property, or passengers, for compensation" and deleted the word "exclusively" which had previously appeared immediately following "motor vehicles used". Public Law No. 777, 75th Cong., 3d Sess., June 29, 1938, Ch. 811, §§ 2, 3, 52 Stat. 1237. In 1952 the words "including horticultural" were added. Public Law No. 472, 82nd Cong., 2d Sess., July 29, 1952, Ch. 599, 66 Stat. 479. For an exhaustive discussion of the legislative history see Judge Graven's opinion in *Interstate Commerce Commission* v. *Allen E. Kroblin*, 113 F. Supp. 599 (N.D. Iowa, 1953), aff'd 212 F. 2d 555 (C.A. 8, 1954), *cert. den.* 348 U.S. 896 (1954).

[2] The Commission originally construed the agricultural exemption as inapplicable to a motor vehicle which *at any time* handled nonexempt commodities and issued operating authorities in accordance with that construction. *E. g., Deer Contract Carrier Application*, 43 M.C.C. 437 (1944). However, the Commission's interpretation was rejected in two court cases, the courts concluding that the statute exempted unmanufactured agricultural commodities unless they move *in the same vehicle* with nonexempt commodities. *Interstate Commerce Commission* v. *Dunn*, 166 F. 2d 116 (C.A. 5, 1948); *Interstate Commerce Commission* v. *Service Trucking Co.*, 91 F. Supp. 533 (E.D. Pa., 1950), aff'd 186 F. 2d 400 (C.A. 3, 1951). Thereafter, the Commission acquiesced in the courts' interpretations. *The Transport Corporation Extension—Maryland Counties*, 53 M.C.C. 75 (1951).

The 1958 Act was enacted in an atmosphere of uncertainty and continuing dispute concerning the status of innumerable commodities and was designed both to eliminate uncertainty and to bring under complete economic regulation some items, including frozen fruits, frozen berries and frozen vegetables, which had been found to be exempt unmanufactured agricultural commodities.[1] Section 7(a) added two provisos to the agricultural exemption, the first adopting the commodity status classification in a Commission ruling (Administrative Ruling Number 107), the second, notwithstanding the first, specifically declaring certain property, including frozen fruits, frozen berries and frozen vegetables, not to be unmanufactured agricultural commodities. Sections 7(b) and 7(c) of the 1958 Act provided continuing rights to transport property made subject to regulation by Section 7(a) for those then holding operating authority (or prosecuting an application therefor) covering such property or who, on May 1, 1958, were in bona fide operation in the transportation of such property for compensation and filed an application for appropriate ("grandfather") authority.

(2) History Of These Proceedings

Appellant has specialized in the transportation of foodstuffs since 1932, operating since The Motor Carrier Act, 1935 both under certificates issued by the Commission and under the agricultural exemption. By 1958 the transportation of foodstuffs requiring refrigeration in transit, including frozen fruits, frozen berries and frozen vegetables, accounted for about 45% of its entire revenues. Operating from its headquarters at Bridgeville, Delaware (on the Del-Mar-Va Peninsula) Appellant of-

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[1] *E. g., East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U.S. 49 (1956); *Home Transfer & Storage Company* v. *United States*, 141 F. Supp. 599 (W. D. Wash., 1956), aff'd *per curiam*, 352 U.S. 884 (1956).

fered service to and from points in the eastern United States, extending from Maine to Florida.

Since the 1958 Act made all transportation of frozen fruits, frozen vegetables, and frozen berries subject to regulation, Appellant filed a timely application under Section 7(c) of the 1958 Act (the *Grandfather Case*)[4] and an identical application under Section 207(a) of the Interstate Commerce Act, (the *Extension Case*),[5] seeking authority to transport these three commodities:

(1) Between all points in New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia and the District of Columbia;

(2) Between the points described in (1) above, on the one hand, and, on the other, all points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, North Carolina, South Carolina, Georgia and Florida; and

(3) Between all points in Maine, Massachusetts, and Connecticut, on the one hand, and, on the other, all points in North Carolina, South Carolina, Georgia and Florida.[6]

Appellant sought only one grant of authority permitting it to continue to render service long offered and performed without the directional limitations and circuitous service which would result from handling the three com-

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[4] Styled by the Commission as *Lester C. Newton Trucking Co., Common Carrier "Grandfather" Application*, No. MC-113388 (Sub-No. 26).

[5] Styled by the Commission as *Lester C. Newton Trucking Co., Extension—Frozen Fruits, Vegetables and Berries*, No. MC-113388 (Sub-No. 27).

[6] The applications also sought to handle rejected and damaged shipments and empty pallets and containers on return. However, the Commission otherwise held that no authority is required for such transportation and that portion of the applications need not be further considered.

modities under certificates already held by Appellant when the 1958 Act was enacted. Appellant's pertinent pre-existing certificates authorize service to, from or between points in all 16 States and the District of Columbia covered by Appellant's applications, but in some areas the service authorized is in one direction (*e.g.*, to points in the New England States) and between some points authorized service could only be rendered via circuitous routes (*e.g.*, from Camden, New Jersey to New York City via Dover, Delaware).

At the consolidated hearing in 1961 on both applications Appellant offered evidence concerning the scope of its existing certificated authority, the area in which it offered and provided service, and the continued need for its service in the future. The applications were supported by two large processors of the commodities involved (John H. Dulany and Son, Inc. and Libby, McNeill & Libby), whose witnesses attested to Appellant's past holding out and service throughout the territory involved, responsive to the shifting origins and destinations, the future continuing and expanding need for service, and the adequacy of existing service only if Appellant's service was included. Opposing evidence was submitted in behalf of three rail carriers and eight motor common carriers.

Following the hearings there were four written Reports, the first by the Hearing Examiner and three by the Commission, two by its Division 1 (composed of three Commissioners) prior to the institution of this action in the lower Court (on October 12, 1962), one thereafter by the Entire Commission on reconsideration.* All of

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* Following this Court's decision in *Wells Cargo Freight Express, Inc. v. United States*, *supra*, the Commission vacated all prior orders and reopened both proceedings for reconsideration, the lower Court's action being stayed pending such reconsideration. The Entire Commission Report on Reconsideration followed, dated May 27, 1965.

these Reports are included in the separate Appendix accompanying this Jurisdictional Statement.

The Scope of the authority granted in each of these four Reports is summarized in chart form in Appendix B attached hereto and as shown therein varied widely. Fundamental to the impact of the proceedings upon Appellant, the Commission found that Appellant may now handle frozen fruits, frozen vegetables and frozen berries only under its pre-existing certificates reading *"General commodities"* or *"Frozen Foods"* and that Appellant may not handle them under its *"Agricultural commodities"* certificates.* The Commission thereby reduced Appellant's future service almost entirely to one direction (*to* all points in all States extending from Maine to North Carolina), outbound only from a few points in Delaware, Virginia and New York, and via circuitous routes from points in New Jersey and a few points in Maryland. Ultimately denying the *Extension Case* in its entirety, the Commission granted authority in the *Grandfather Case* only (a) between points in a base area consisting of the District of Columbia, Delaware, Maryland and points in Virginia on the Del-Mar-Va Peninsula; (b) from points in New York to points in the base area; (c) from points in the base area to points in New York and Pennsylvania, and two Connecticut, one Maine, and two New Jersey points; (d) from points in Pennsylvania to Exmore Va.; and (e) from Caribou, Maine to New York City, and Carnegie, Pa. Thus, except within the limited base area granted, the Commission's action would leave Appellant with atomized authority, almost entirely one-way, without substantial parity between Appellant's past and future operations, lacking requisite

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* Appellant has other certificated authority reading "Farm products, except citrus fruits", which was equated by the Commission with and deemed the same as the "Agricultural commodities" certificates and both are similarly comprehended herein under all discussions of the latter terminology.

flexibility to continue to meet the shifting requirements of its shippers within the entire area involved.

The lower Court recognized the central importance of interpretation of Appellant's pre-existing certificates to the validity of the Commission's ultimate action.[9] While refusing to accept the Commission's rationale that Appellant's pre-existing *Agricultural commodities* certificates did not cover frozen fruits, frozen vegetables and frozen berries prior to the 1958 Act, the District Court nonetheless concluded that Appellant's pre-existing certificates do not now cover such commodities. The District Court otherwise affirmed the Commission's actions in the *Grandfather* and *Extension Cases* based upon the restrictive interpretation.[10]

The Commission's Orders were restrained at all stages before the lower Court and, by Order of the lower Court, entered March 20, 1967, on stipulation of the parties, the Commission's Orders have been stayed pending disposition of this Appeal.

(3) The Commission And The Lower Court Have Narrowed Appellant's Pre-existing Certificates

Under Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(6), the exempt status of a commodity depends upon the commodities otherwise handled

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[9] The Court stated, 264 F. Supp. 869, at 873-74:

"If we accepted this first argument that Newton's present certificates already authorize the desired full scope of transportation, it would of course become unnecessary to proceed further to Newton's second and third arguments under the 'grandfather' and extension provisions, respectively."

[10] The importance of the interpretation in the assessment by the District Court of the *Grandfather Case* is shown by its detailed comparison of the pre-existing authority of Appellant as restrictively construed to the scope of the authority granted by the Commission.

in the vehicle involved." The Commission, the lower Court, and Appellant all agree that Appellant's *Agricultural commodities* certificates were issued to permit the transportation of unmanufactured agricultural commodities as defined in Section 203(b)(6) "in those instances wherein transportation was not actually 'exempt' from economic regulation."[13] Thus, commodities included in Applicant's *Agricultural commodities* certificates are the same as those included within the agricultural exemption of Section 203(b)(6). Since Appellant's certificates were all issued long before the 1958 Act, it logically follows that Appellant's certificates included frozen fruits, frozen vegetables, and frozen berries prior to the 1958 Act.[14] Moreover, since Section 7(b) of the 1958 Act specifically saved the rights of holders of appropriate pre-existing certificates to continue to transport property made subject to regulation by Section 7(a), Appellant's pre-existing rights are confirmed by the 1958 Act itself.[15]

Despite the apparent simple logic involved, both the Commission and the lower Court reached the opposite result by entirely different routes. The Commission based its conclusion that Appellant's pre-existing *Agricultural commodities* certificates do not cover the commodities involved on the grounds that: (a) the Commission allegedly did not intend to include such frozen articles when it initially issued the authority; and (b) the 1958 Act, by making these frozen items subject to regulation

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[13] Decision, note 2, *supra*.

[14] First Commission Report, 54 M.C.C. 759, at 767. Compare, [illegible] F. Supp. 868, at 876; *Penn-Dixie Lines, Inc., Extension-Philadelphia*, 79 M.C.C. 188 (1958).

[15] [illegible] note 3 *supra*.

[illegible] 7(b) the narrowing of pre-existing [illegible] is in conflict with Section 212(a) of the [illegible] Act, 49 U.S.C. § 312(a). *Andrus v. Motion, Inc. v. United States*, 355 U.S. 534, at 538 n. 4 (1958).

and providing "grandfather" rights, allegedly "effectively removed" any possibility that such certificates would be construed to include such frozen articles. The Commission's first ground assumes a specific intent which could not have existed at the time the certificates in question were initially issued;[14] the Commission's second ground ignores and contradicts Section 7(b) of the 1958 Act.

The lower Court did not accept either of the Commission's grounds for construing Appellant's pre-existing *Agricultural commodities* certificates. The majority of the lower Court agreed that it could reasonably be concluded that immediately before the 1958 Act Appellant's *Agricultural commodities* certificates corresponded in scope to the Section 203(b)(6) exemption and permitted the transportation of frozen fruits, berries, and vegetables in mixed loads with non-exempt products. Assuming such pre-1958 Act coverage *arguendo*, the lower Court concluded, by a process of reasoning *sua sponte* and altogether unclear to Appellant, that these certificates do not now cover such articles.[15] Thus, without ap-

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[14] The Commission observed in discussing Appellant's *General commodities* and *Frozen foods* certificates, First Commission Report, 84 M.C.C. 759, at 768:

> "Admittedly, a commodity description may be subsequently construed to include 'new' items not considered at the time such description is employed."

All of Appellant's pre-existing *Agricultural commodities* certificates were initially issued in the earliest days of motor carrier regulation, when the Commission viewed as "tainted" a vehicle which at any time carried a non-exempt commodity. (See note 2 *supra*) and long prior to the beginning of motor carrier transportation of any commodities requiring refrigeration, an industry in its infancy in 1944. *Newton Extension—Frozen Foods*, 42 M.C.C. 787 (1944).

[15] The lower Court found that Appellant's pre-existing *General commodities* and *Frozen foods* certificates now cover the transportation of frozen fruits, vegetables and berries. However, the basis for distinguishing the coverage of such certificates from Appellant's pre-existing *Agricultural commodities* certificates is unclear. Prior to the 1958 Act no certificate was required for handling frozen fruits, vegetables or berries except when these articles

parently recognizing the fact, the lower Court has found that Appellant's pre-existing certificates were narrowed by the 1958 Act.

(4) The Limited Authority Granted By The Commission Would Atomize Appellant's Future Service And Deprive The Public Of Needed Service

Had the Commission remedied its narrow interpretation of Appellant's pre-existing certificates by appropriate grant of new authority Appellant could hardly be heard to complain. However, the Commission denied the *Extension Case* and granted only limited authority in the *Grandfather Case* confined to a limited base area in Delaware, Maryland, the District of Columbia and points in Virginia on the Del-Mar-Va. Peninsula and between this base area and a limited number of points.

In considering the grant of the limited base area the Commission expressly considered Appellant's pattern of operations and the characteristics of its service for the supporting processors.[17] Except with respect to the base area granted, however, the Commission gave no apparent consideration to Appellant's overall operations or the characteristics of its service for the supporting shippers. Instead, the Commission limited itself in the *Grandfather Case* to determining authority upon the basis of a statistical analysis of past shipments actually handled and in the *Extension Case* to a denial because existing service was not shown to be inadequate.

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moved in vehicles with other "regulated" commodities. Thus, in the absence of mixture none of the Appellant's certificates were required no matter how phrased. In the event of mixture all of Appellant's certificates, whether reading *General commodities, Frozen foods,* or *Agricultural commodities,* covered the otherwise exempt commodities in such cases.

[17] The fact that the supporting processors are engaged in the production of all three of the involved commodities—frozen fruits, vegetables and berries—was also expressly considered by the Commission as support for treating the three as a single class.

The statutory criteria for a grant of authority differed in the two cases, the *Grandfather Case* involving an application under Section 7(c) of the 1958 Act, the *Extension Case* involving an application under Section 207(a) of the Interstate Commerce Act. Appellant was less concerned with differing statutory criteria than with its ability to continue to render service within its area of service responsive to the shifting transportation requirements of the segment of the shipping public served by it.

The cumulative effect of the Commission's restrictive interpretation and restricted grant of authority would be an atomized, one-way, service ill-suited to meet the needs of the shipping public served by Appellant. The supporting processors have three Delaware (Bridgeville, Houston and Dover) and one Virginia (Exmore) processing points and Appellant has long served these locations inbound and outbound, handling traffic in both directions to and from points in all States extending from Maine to Florida as the vagaries of the shippers' traffic patterns dictated. Appellant may continue to serve these Delaware and Virginia points outbound under *Frozen food* certificates to all points in all States extending from Maine to North Carolina. However, by combining all pre-existing *General commodities* and *Frozen food* certificates with the authority granted by the Commission Appellant may not continue to serve any of these Delaware and Virginia points inbound from any point in New England or any point in North Carolina or Virginia (except on the Del-Mar-Va. Peninsula).[18]

The significance for the supporting processors of each

[18] The Hearing Examiner recommended a grant in the *Extension Case* inbound to the two major processing centers to the extent of Appellant's outbound *Frozen foods* authority as "[a] practical solution. . . ." The First Division Report likewise granted authority in the *Extension Case* from all points in all States (except New Hampshire, Vermont, Delaware and Virginia) extending from Maine to North Carolina to all points in Virginia, Delaware and Maryland.

type of shipment handled by Appellant was detailed in the record, reflecting Appellant's holding out and service commensurate with its limited size and the changing requirements of the processors throughout the area covered by the application, between processing centers and customers, warehouses, and co-packers, and between warehouses located throughout the area and customers and co-packers. Moreover, the supporting witnesses testified that existing service was adequate to meet their needs only if Appellant's service was included.[19] Nonetheless, the Commission ultimately denied the *Extension Case* on the ground that the evidence did not show that "the service afforded by existing service is inadequate."[20]

The lower Court recognized that the Commission's interpretation of Appellant's pre-existing certificates was fundamental to all of the Commission's actions in the *Grandfather* and *Extension Cases*.[21] Having found the Commission's interpretation warranted, the lower Court considered in detail the Commission's action in the *Grandfather Case*, comparing the authority sought and

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[19] The following pertinent colloquy occurred at the hearing during one processor's cross-examination (R. 148):

"Q. And presently the motor carriers that you have available into Houston, Delaware, and into the States previously mentioned would be adequate for the needs that you have now?

A. Yes.

Exam. Driscoll: Well, this is not understood. Does that include this applicant or not?

The Witness: Pardon?

Exam. Driscoll: Does this include this applicant or not?

The Witness: It does."

[20] Respecting part (8) of the applications (between points in Maine, Massachusetts and Connecticut, on the one hand, and on the other, points in North Carolina, South Carolina, Georgia and Florida) the supporting evidence showed a service needed which had not previously been available from anyone. The Hearing Examiner recommended a grant in the *Extension Case* excepting Florida.

[21] See note 8, supra.

granted, the authority held by Appellant under *General commodities* and *Frozen foods* certificates, and the actual shipments handled by Appellant. The lower Court evidenced no concern for the ultimate impact of the restricted grant upon Appellant's future ability to provide service in both directions throughout the areas encompassed responsive to the changing requirements of the shippers involved. Separately considering the *Extension Case* the lower Court found support for the Commission's finding of adequate existing service, including joint line service, and found that the Commission was warranted in concluding that the actual points served by Appellant beyond those covered by the grant in the *Grandfather Case* did not justify any additional grant.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

1. This appeal raises fundamental questions whether the Interstate Commerce Commission may narrow the scope of a motor carrier's authority confirmed by statute, administratively restrict legislation plainly intended to preserve a carrier's existing business under regulation on a substantial parity with its prior scope, and refuse to grant additional authority to enable service commensurate with preregulation scope because other services have not been shown to be inadequate. Each of these questions merits plenary consideration by this Court.

A. When Congress brought frozen fruits, frozen vegetables and frozen berries, *inter alia*, under complete regulation by the Transportation Act of 1958 it expressly provided continuing transportation rights in Section 7(b) for those then holding certificates. Pre-existing certificates corresponding to and comprehending the scope of commodities within the agricultural exemption prior to the 1958 Act thus were confirmed by statute and no discretion was vested in the Interstate Commerce Commission thereafter to narrow such certificates by re-

strictive interpretation. Here, both the Commission and the lower Court found Appellant's pre-existing certificates to be narrower now than they were before the 1958 Act. The Commission ignored Section 7(b) and found the "grandfather" provisions of Section 7(c) of the 1958 Act as evidence of congressional intent that pre-existing certificates not be broadly construed. The lower Court found Appellant's pre-existing certificates not to cover the involved commodities even if such coverage existed prior to the 1958 Act. The present scope of certificates antedating the 1958 Act is a matter of great importance to all motor carriers holding authority issued by the Commission prior to the 1958 Act. The plain meaning of Section 7(b) of the 1958 Act precludes narrowing the scope of such pre-existing authority and unless this Court reverses the findings below Appellant and all other motor carriers holding such authority will lose valuable transportation rights. This Court has not previously been afforded an opportunity to consider this issue.

B. It may not now be doubted that the proper criteria for determining the scope of "grandfather" rights under Section 7(c) of the Transportation Act of 1958 are the same as those under the Motor Carrier Act, 1935. *Willis Shaw Frozen Express, Inc.* v. *United States, supra.* The purpose of the "grandfather" clause was to assure "substantial parity between future operations and prior bona fide operations." *United States* v. *Carolina Freight Carriers Corp., supra,* 315 U.S. 475, at 481. In determining "grandfather" rights respecting the 1958 Act the Commission must consider the applicant's "status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of [the applicant] to perform the services." *Willis Shaw Frozen Express, Inc.* v. *United States, supra,* 377 U.S. 159, 160.

Except respecting the base area ultimately granted and otherwise in treating the three commodities as a single class, the Commission and the lower Court ignored all evidence except that of actual past points served in violation of the principles expressed in the *Carolina* and *Willis Shaw* cases.

C. The lower Court failed to judge the Commission's denial of all authority under Section 207(a) of the Interstate Commerce Act on the basis on which the Commission predicated such denial—the lack of showing of inadequacy of existing service. Compare, *Securities & Exchange Commission* v. *Chenery*, 318 U.S. 80 (1943). Thereby, the lower Court avoided considering how the Commission, in determining this issue, could reconcile this finding with the evidence showing that existing service was adequate only if Appellant's existing service was included. The lower Court's treatment of this issue is in conflict with the opinion of the three-judge District Court for New Hampshire in *Nashua Motor Express, Inc.* v. *United States*, 230 F. Supp. 646 (1964), which set aside a Commission denial under comparable circumstances, stating in part (at 653):

> By what hypothetical process of subtraction has Division 1 reached its conclusion that protestants' services *would* be adequate in the absence of those disputed services presently performed by the plaintiff applicant?

The lower court's consideration of the adequacy issue is also in conflict with the opinions of other three-judge District Courts. *Bowman Transportation, Inc.* v. *United States*, 211 F. Supp. 354 (N.D. Ala., 1962); *Dixie Ohio Express, Inc.* v. *United States*, 263 F. Supp. 993 (N.D. Ohio, 1966). The issue of adequacy of existing service when an applicant is already a competitor in the traffic involved is a matter of great importance to the proper

administration of motor carrier regulation and should be definitively determined by this Court.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Motor Carrier Act

Section 203 (b) (6), 49 U.S.C., § 303 (b) (6)*

(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: *Provided, That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": Provided further, however, That notwithstanding the proceeding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have*

* Emphasized portions are the amendments to this section effected by Section 7(a) of the Transportation Act of 1958, 72 Stat. 573.

been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products)' . . .

Section 207(a), 49 U.S.C. § 307(a)

Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Transportation Act of 1958

Section 7(a), 72 Stat. 573—[See Section 203(b)(6) of the Motor Carrier Act, *supra*]

(b) Unless otherwise specifically indicated therein, the holder of any certificate or permit heretofore issued by the Interstate Commerce Commission, or hereafter so issued pursuant to an application filed on or before the date on which this section takes effect, authorizing the holder thereof to engage as a common or contract carrier by motor vehicle in the transportation in interstate or foreign commerce of property made subject to the provisions of part II of the Interstate Commerce Act by paragraph (a) of this section, over any route or routes or within any territory, may without making application under that Act engage, to the same extent and subject to the same terms, conditions and limitations, as a common

or contract carrier by motor vehicle, as the case may be, in the transportation of such property, over such route or routes or within such territory, in interstate or foreign commerce.

(c) Subject to the provisions of Section 210 of the Interstate Commerce Act, if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act by paragraph (a) of this section, in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in Part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect. Pending the determination of any such application, the continuance of such operation without a certificate or permit shall be lawful. Any carrier which on the date this section takes effect is engaged in an operation of the character specified in the foregoing provisions of this paragraph, but was not engaged in such operation on May 1, 1958, may under such regulations as the Interstate Commerce Commission shall prescribe, if application for a certificate or permit is made to the said Commission within one hundred and twenty days after the date on which this section takes effect, continue such operation without a certificate or permit pending the determination of such application in accordance with the provisions of part II of the Interstate Commerce Act.

APPENDIX B

COMBINED RIGHTS GRANTED IN *GRANDFATHER* AND *EXTENSION* CASES

EXAMINER'S REPORT

	From	*To*
1.	Boston and Cambridge, Mass., and all points in D.C., Conn., N.Y., N.J., Pa., Del., Md., Va., and N.C.	Exmore, Va., and Bridgeville, Del.
2.	Caribou, Me.	New York, N.Y.
3.	Watertown, Mass.	Philadelphia, Pa.

Between

All points in N.C., S.C., and Ga. on the one hand, and, on the other, all points in Me., Mass., and Connecticut.

DIVISION I

(FIRST AND SECOND COMMISSION REPORTS)[1]

	From	*To*
1.	Exmore, Va.	Sunbury, Carnegie, York and Williamsport, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewistown, Me., and Binghamton, Newburg and New York, N.Y.
2.	Bridgeville, Del.	Exmore, Va.
3.	Exmore, Va.	Exeter, Pa.[2]

[illegible] Points listed in the First Commission Report [illegible] and more thereafter denied in the Second Commission Report [illegible] to it [illegible] in connecting [illegible] Virginia and Boston only:

COMBINED RIGHTS GRANTED IN *GRANDFATHER* AND *EXTENSION* CASES—Continued

From	*To*
4. Houston, Del.	New York, N.Y. and Hartford, Conn.[3]
5. Clayton, Del.	Exmore, Va.[4]
6. Points in Maine, Mass., R.I., Conn., N.Y., N.J. Pa., Md., N.C., and D.C.	Points in Va., Del., and Md.
7. Points in Maine, Mass. and Conn.	Points in Pa.
8. Points in Maine	Points in N.Y.

THIRD COMMISSION REPORT

From	*To*
1. Caribou, Me.	New York, N.Y. and Carnegie, Pa.
2. Points in N.Y.	D.C., and points in Md., Del., and Va. on the Delmarva Peninsula
3. Points in Pa.	Exmore, Va.
4. D.C., and points in Md., Del., and Va. on the Delmarva Peninsula	Hartford and Wallingford, Conn., Lewiston, Me., Kearney and Jersey City, N.J. and points in N.Y., and Pa.

Between

Points in Md., Del., and Va. on the Delmarva Peninsula, and the District of Columbia.

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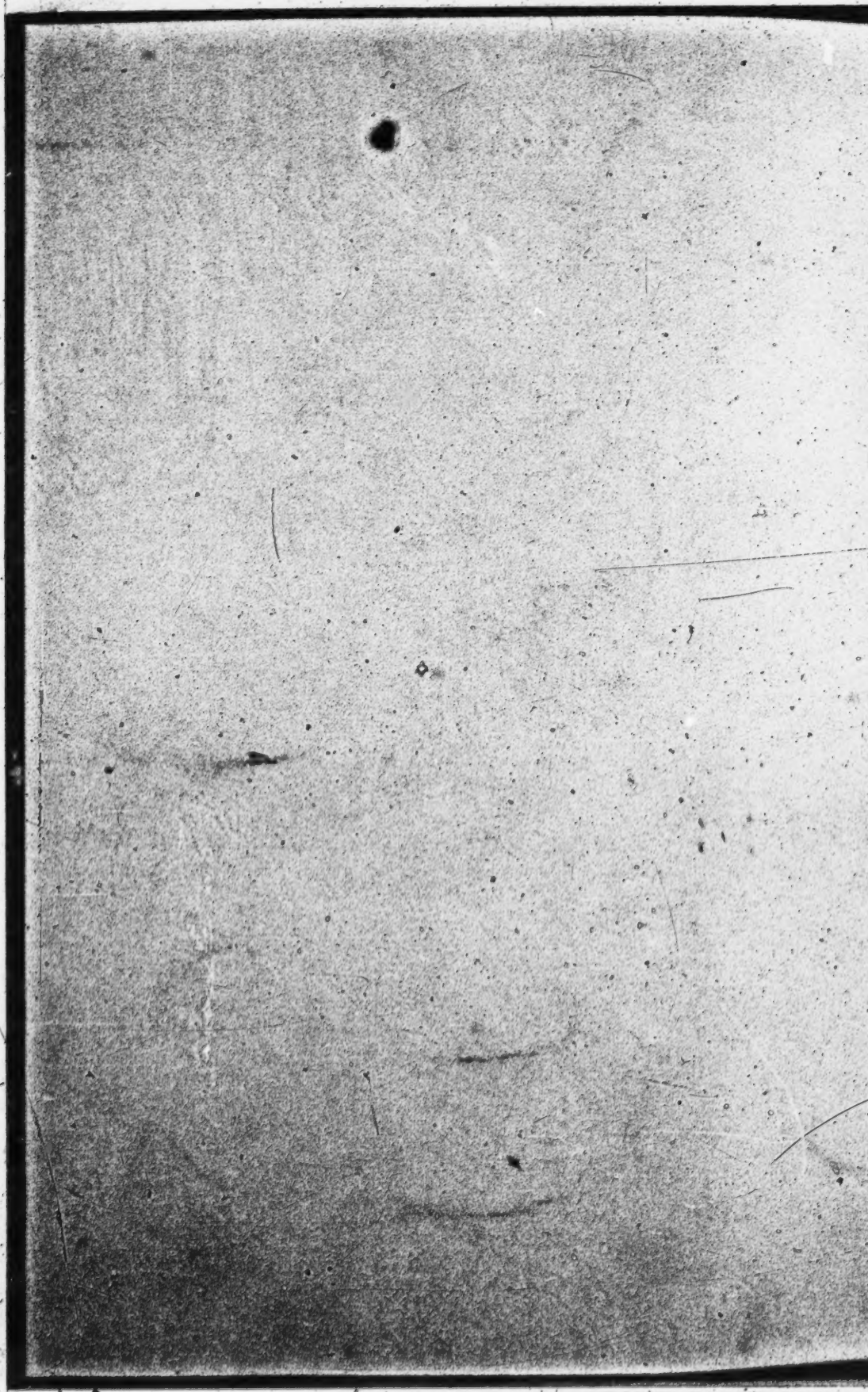
[3] Frozen Vegetables only.

[4] Frozen Vegetables only.



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SUPREME COURT, U. S.

No. 328

FILED
JUL 5 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

LESTER C. NEWTON TRUCKING COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION,
Appellees.

APPENDIX OF OPINIONS BELOW TO APPELLANT'S JURISDICTIONAL STATEMENT

H. CHARLES EPHRAIM
C. ROBERT ZELNICK
1411 K Street, N. W.
Washington, D. C. 20005

H. JAMES CONAWAY
1401 Bank of Delaware Bldg.
Wilmington, Delaware 19801

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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INTERSTATE COMMERCE COMMISSION

Served February 5, 1960

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 10 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise would be applicable to this proceeding.

The certificate or permit will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-113388 (Sub-No. 26)[1]

LESTER C. NEWTON TRUCKING CO., COMMON CARRIER "GRANDFATHER" APPLICATION

Decided

1. In No. MC-113388 (Sub-No. 26), applicant found entitled to continue operations as a common carrier by motor vehicle, of the commodities, from and to the points, and in the manner and form, described in the findings herein, by reason of having been engaged in such operations on and continuously since May 1, 1958.
2. In No. MC-113388 (Sub-No. 27), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, from and to the points, and in the manner and form, described in the findings herein.
3. Issuance of certificates authorized upon compliance by applicant with certain conditions. Both applications denied in certain respects.

H. Charles Ephraim for applicant.

John M. Musselman, F. Steele Langford, Clayton J. Logan, Francis P. Barrett, John T. Collins, James W. Lawson, Edwin H. Gehring, Frank B. Hand, Jr., and *Chester E. King* for protestants in one or both proceedings.

[1] This report includes No. MC-113388 (Sub-No. 27), Lester C. Newton Trucking Co., Extension—Frozen Fruits, Vegetables, and Berries.

REPORT AND ORDER

RECOMMENDED BY MICHAEL B. DRISCOLL, EXAMINER

Lester C. Newton Trucking Co., of Bridgeville, Del., by application No. MC-113388 (Sub-No. 26) filed December 8, 1958, as amended, under the "grandfather" provisions of section 7(c) of the Transportation Act of 1958, seeks a certificate of public convenience and necessity authorizing the continuance of operations, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, (1) between all points in New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and the District of Columbia, (2) between the points described above, on the one hand, and, on the other, all points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, North Carolina, South Carolina, Georgia, and Florida, and (3) between all points in Maine, Massachusetts, and Connecticut, on the one hand, and, on the other, all points in North Carolina, South Carolina, Georgia, and Florida, and of (4) empty containers and damaged or rejected shipments in the reverse directions.

The same applicant, by application No. MC-113388 (Sub-No. 27), filed November 17, 1959, as amended, seeks an identical certificate for the identical commodities and identical points described above in connection with application No. MC-113388 (Sub-No. 26).

Under appropriate orders, both applications were heard by this examiner at Washington, D. C., January 6-7, 1960. By agreement of all parties, and with approval of the examiner, both were heard upon a single record.

Four rail carriers, one association of motor carriers, and 18 motor carriers oppose either one or both of these applications.

Applicant is a Delaware corporation, with headquarters at Bridgeville, Del. It carriers on a business started by its president in 1932. It operates, entirely over irregular routes, as a motor common carrier. While it has some relatively important general commodity authority, most of its authority is for specified commodities. That authority for specified commodities is rather large in territorial scope. That authority includes agricultural commodities, farm produce, and frozen foods.

Applicant began transporting frozen foods in 1938. That part of its business has been growing, so that now about 45 percent of its gross revenue comes from such traffic. In 1942, applicant received certain authority for frozen foods, and additional grants therefor were subsequently made.

Although the extent and scope of such transportation is not very clearly shown, applicant also transported some frozen foods under its authority for agricultural commodities and farm produce. This is neither a proper nor sufficient record for the determination of such a technical problem, but it seems very obvious that the terms "agricultural commodities" and "farm produce" were never designed nor intended to cover frozen products.

At any rate, applicant has been transporting some frozen foods products, and it is here claiming "grandfather" rights for such transportation.

In addition to that, applicant is seeking identical rights in its extension application. To the extent it might not be [illegible] case, it requests that it be [illegible] One idea is to territorially [illegible] would mean additional [illegible] Another idea is to avoid [illegible] certain authorities and [illegible] of combining certain [illegible] Another idea is to obtain more

specific authority and is thereby avoid the possibility of unfavorable commodity coverage determinations.

Applicant seeks no duplication of authority, and it is willing that any authority granted here be restricted against tacking with any other authority it holds.

Applicant has its home office and principal terminal at Bridgeville. Repairs are taken care of by an outside garage. Applicant has a sales representative and office at Bergen, N. J. That facility includes parking facilities. A service station is nearby. Applicant is giving some consideration to the establishing of a similar office at Boston, Mass.

Applicant operates 16 tractors and 16 trailers. All equipment is owned except two tractors and one trailer, which are operated under leases. One trailer is a dry freight van. All other trailers are insulated and equipped for refrigeration. Seven are mechanically refrigerated. Eight are equipped with ice bunkers and blowers. The bunker types are only occasionally used for frozen foods, so that for all practical purposes we are limited here to seven trailers. An additional mechanically refrigerated trailer is on order. Applicant's employees include 15 drivers.

As of October 31, 1959, applicant had total assets of $190,786. Its current assets were $56,408, and its current liabilities were $38,855. Its capital stock was carried at $46,000, and its surplus was $55,594. Its net income for the first 10 months of 1959 was, before provisions for income taxes, $15,025.

Applicant declares that it will place equipment where it is needed and that, if traffic warrants such action, it will purchase necessary additional equipment.

Consideration will now be given to applicant's "grandfather" claims. To be entitled to rights, applicant must

show transportation on and continuously since May 1, 1958. In order to make a sensible and practical determination in this particular case, certain principles must be applied. These will be explained. For typical shipments, consideration will be given to the period from January 1, 1957, through December 31, 1958. Even though most of the transported commodities have been vegetables, applicant did not limit its holding out and its service to anything less than fruits, berries, and vegetables. Any rights found should include those three groups. Where applicant served two or more points in a particular State, it should be given authority to serve the entire State as origin or destination State, as the case may be. Two or more shipments from and to particular points shall be accepted as a basis for recommending "grandfather" rights. Less than two will be disregarded, upon the theory that such transportation is mere casual or occasional transportation. In other words, the volume and frequency are not sufficient for consideration for purposes here.

Using Exmore, Va., as a destination, it is found that, during the "grandfather" period, applicant transported 13 shipments from the District of Columbia; 3 from New York, N. Y.; 12 from Cambridge, Md.; 4 from Hagerstown, Md.; 1 from Scranton, Pa.; 4 from Lancaster, Pa.; 4 from Clayton, Del.; and 1 each from Richmond, Va., Binghamton, N. Y., and Caribou, Maine.

In addition to that transportation to Exmore, applicant also transported two shipments from Watertown, Mass., to Philadelphia, Pa., and three shipments from Caribou, Maine, to New York, N. Y. One shipment each was transported from Middleport, N. Y., to Salisbury, Md.; from Caribou, Maine to Carnegie, Pa.; from Hagerstown, Md., to Carnegie, Pa.; from Washington, D. C., to Bridgeville, Md.; from Watertown, Mass., to Houston, Del.; from Hartford, Conn., to Houston, Del.; from Seabrook, N. J., to Roanoke, Va.; from Seabrook, N. J., to Norfolk, Va.;

from Tampa, Fla., to Jersey City, N. J.; from Tampa, Fla., to New York, N. Y.; and from Georgetown, Del., to Pittsburgh, Pa.

Using the tests stated above, it is concluded that applicant is entitled to "grandfather" rights for frozen fruits, frozen berries, and frozen vegetables to Exmore, Va.; from the District of Columbia, New York, N. Y., Clayton, Del., and from all points in Maryland and Pennsylvania; from Caribou, Maine, to New York, N. Y.; and from Watertown, Mass., to Philadelphia, Pa.

Two shippers supported the extension application. One of these is Libby, McNeill & Libby, hereinafter called Libby. It has plants at Sunnyvale, Calif., at four points in Washington, at Ocala, Fla., and at Houston, Del. In connection with the Houston plant, it maintains a large storage warehouse at Dover, Del. It maintains storage facilities at a number of points throughout the territory of this application. Example of those points are Portland, Maine, Boston, Mass., New York, N. Y., Landover, Md., Raleigh, N. C., Columbus, S. C., Atlanta, Ga., Miami, Fla., Pittsburgh, Pa., and Hartford, Conn.

Libby widely uses motor service and it prefers single over joint line service. It also prefers, and declares a need for service under which split pickups and split deliveries can be made. It uses a number of carriers. It does not complain of the service of any particular carrier. In fact, it admits that, within the scopes of their authorities, those used carriers render satisfactory service. It does not actually show, or even allege, that it has any service problem either into or out of its Houston plant or its Dover storage. It admits that it has adequate service in connection with its Ocala plant.

Libby does declares that there have been movements between different field warehouses and from different field warehouses to customers. Except for certain Southeast-

New England movements, it does not recite any particular difficulty at any particular point, nor does it describe any particular shipment or any particular incident.

Libby declares that it has movements between North Carolina, South Carolina, and Georgia, on the one hand, and, Maine, Massachusetts, and Connecticut, on the other, and that the available service therefor is not adequate. It asserts that no usable one-line service is available between those territories, and it insists that it does not wish to use joint line service for that movement.

John H. Dulany & Son, Inc., hereinafter called Dulany, has food processing plants and storage warehouses at Exmore, Va., and Bridgeville, Del. It also has warehouses at Carnegie and York, Pa., at Landover and Hagerstown, Md., Norfolk, Va., Raleigh and Asheville, N. C., Charleston, S. C., and New York, N. Y. It uses rail service for movements from the West into the East, Midwest, and South, but it uses motor service entirely out of its Exmore and Bridgeville plants.

In addition to its own plants, Dulany has production at plants of so-called co-packers. It explains that those co-packers might be changed from time to time. It ships from its own plants, and from plants of its co-packers, to its warehouses and direct to consignees.

Dulany uses a number of motor carriers, and applicant is one of its principal carriers.

Dulany admits that it has no problems out of its plants at Exmore and Bridgeville. It does not suggest any problem from its field warehouses to consignees.

Dulany makes the point that it would like applicant to be in position to shift with its changing co-packers. Specifically, there is no convincing showing that those shifts have resulted in any material service difficulties, and there is no convincing showing that service difficulties would result in the future.

Dulany is supporting applicant in its "grandfather" application, and much of the traffic submitted in connection with that is apparently co-packer traffic moving into the Dulany plants. Those and other facts tend to show that much or most of the co-packer traffic tends to move into the Dulany plants.

In addition to that, Dulany shows that it has other substantial movements into its plants. Those are composed of returned shipments and over supplies at field warehouses.

On that inbound traffic, Dulany asserts a need for service by applicant. Service from other carriers is not available from all possible or probable origins. Much of that inbound traffic moves in less-than-truckload quantities. From its experience, Dulany has concluded that other carriers, to the extent their services are available, cannot provide adequate service. Applicant, on the other hand, has always provided adequate service for that inbound traffic.

A practical solution of that service problem would be to authorize inbound service by applicant to Exmore and Bridgeville to the extent it holds outbound authority from those points. From those points, applicant has specific authority for frozen foods to Boston and Cambridge, Mass., to the District of Columbia, and to all points in Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and North Carolina. From that territory, applicant should be authorized to provide service to Exmore and Bridgeville.

There is no basis here for attempting to remove any gateways or to permit direct operations in lieu of indirect operations. There is little or no information on those subjects, and none of the necessary burdens have been met by applicant.

There is no basis here for attempting to broaden or change any of the commodity descriptions used in applicant's outstanding authority.

While there is some rail and motor service available from and to the points and areas recommended herein for authorization, the conclusion here is that there is a specific need for applicant's service, in addition to those other services. The further conclusion is that, to the extent other carriers might be detrimentally affected by this authorization, those detrimental effects are outweighed by the benefits to applicant and to the shippers which need this recommended service.

To the extent that the authority recommended herein might duplicate any authority held by applicant, it is not to be construed as conferring more than one operating right.

In No. MC-113388 (Sub-No. 26), the examiner finds that on May 1, 1958, applicant was, and continuously since has been, in *bona fide* operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables (1) from the District of Columbia, New York, N. Y., Clayton, Del., and all points in Maryland and Pennsylvania to Exmore, Va., (2) from Caribou, Maine to New York, N. Y., and (3) from Watertown, Mass., to Philadelphia, Pa.; that applicant is entitled to a certificate authorizing the continuance of such operations; that the certificate authorizing the described operations should be granted, subject to the restriction that the authority granted herein shall not be tacked to any other authority held by applicant; and that the application in all other respects should be denied.

In No. MC-113388 (Sub-No. 27), the examiner finds that the present and future public convenience and necessity require operation by applicant, in interstate or for-

eign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables (1) between all points in North Carolina, South Carolina, and Georgia, on the one hand, and, on the other, all points in Maine, Massachusetts, and Connecticut, (2) and from Boston and Cambridge, Mass., the District of Columbia, and all points in Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and North Carolina, to Exmore, Va., and Bridgeville, Del.; that applicant is fit, willing, and able to perform this service and to conform to the requirements of the Interstate Commerce Act and to the Commission's rules and regulations thereunder; that an appropriate certificate should be granted, subject to the restriction that the authority granted herein shall not be tacked to any other authority held by applicant.

The examiner recommends that the appended order be entered.

By Michael B. Driscoll, Examiner.

(Signature) MICHAEL B. DRISCOLL

Recommended by Michael B. Driscoll, Examiner

(Signature) MICHAEL B. DRISCOLL

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of A. D. 1960.

No. MC-113388 (Sub-No. 26)

LESTER C. NEWTON TRUCKING CO., COMMON CARRIER "GRANDFATHER" APPLICATION

No. MC-113388 (Sub-No. 27)

LESTER C. NEWTON TRUCKING CO., EXTENSION—FROZEN FRUITS, VEGETABLES, AND BERRIES

Investigation of the matters and things involved in these proceedings having been made, said applications upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon compliance with the requirements of sections 215, 217 and 221(c) of the Interstate Commerce Act, and with our rules and regulations thereunder, a certificate be issued to applicant authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities described, and in the manner described in the findings in the said report.

It is further ordered, That the applications in all other respects be, and they are hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION

No. MC-113388 (Sub-No. 26)[1]

LESTER C. NEWTON TRUCKING CO. COMMON CARRIER "GRANDFATHER" APPLICATION

Decided April 28, 1961

1. In No. MC-113388 (Sub-No. 26), applicant found entitled to continue operations as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, from and to numerous specified points in seven States and the District of Columbia, by reason of having been engaged in such operations on and continuously since May 1, 1958.

2. In No. MC-113388 (Sub-No. 27), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, from and to points in 11 States and the District of Columbia.

3. Issuance of a single certificate embracing the authority granted in both proceedings approved upon compliance by applicant with certain conditions, and applications in all other respects denied.

---

[1] This report also embraces No. MC-113388 (Sub-No. 27), Lester C. Newton Trucking Co. Extension—Frozen Fruits, Vegetables, and Berries.

H. Charles Ephraim for applicant in both proceedings.

John M. Musselman, F. Steele Langford, Clayton J. Logan, Francis P. Barrett, John T. Collins, James W. Lawson, Edwin H. Gehring, Frank B. Hand, Jr., and *Chester E. King* for protestants in one or both proceedings.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS WALRATH, WEBB, AND TUCKER

BY DIVISION 1:

These proceedings involve related issues, were heard on a consolidated record, were the subject of a single report and recommended order by the examiner, and will be disposed of here in one report. Exceptions to the order recommended by the examiner were filed in both proceedings by applicant and certain protestants, and applicant and certain protestants replied. Our conclusions differ in part from those recommended in both proceedings.

In No. MC-113388 (Sub-No. 26), hereinafter called the sub 26 or "grandfather" proceeding, by application filed December 8, 1958, as amended, under the "grandfather" provisions of section 7(c) of the Transportation Act of 1958, Lester C. Newton Trucking Co., a corporation, of Bridgeville, Del., hereinafter sometimes called Newton, seeks a certificate of public convenience and necessity authorizing the continuance of operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables (1) between points in New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and the District of Columbia, (2) between the points described above, on the one hand, and, on the other, points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, North Carolina, South Carolina, Georgia, and Florida, and (3) between points in Maine, Massachusetts,

and Connecticut, on the one hand, and, on the other, points in North Carolina, South Carolina, Florida and Georgia, and (4) empty containers and rejected or damaged shipments on return.

In No. MC-113383 (Sub-No. 27), hereinafter sometimes called the sub 27 proceeding, by application filed November 17, 1959, as amended, Newton seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of the same commodities, and in the same manner as described in its sub 26 application.

Both applications are opposed by 12 motor carriers[3] and by 3 rail carriers.[4] In addition, The Adley Express Company, Capitol Motor Transportation Company, Hunnewell Trucking Co., hereinafter sometimes called Adley, Capitol, and Hunnewell, repectively, and the Maine Central Railroad Company oppose the sub 26 application, and H. F. Campbell & Son and Lahn Transportation Co., hereinafter called Campbell and Lahn, respectively, oppose the sub 27 application.[5]

---

[3] T. M. Zimmerman Company, Victor Lynn Lines, Inc., Preston Trucking Company, Inc., Clay Hyder Trucking Lines, Inc., Border Express, Inc., Refrigerated Food Express, Inc., Cole's Express, Hemingway Brothers Interstate Trucking Co., M & M Transportation Company, St. Johnsbury Trucking Co., Inc., Service Trucking Co., Inc., and W. T. Cowan, Inc., hereinafter sometimes called Zimmerman, Lynn, Preston, Hyder, Border, Refrigerated, Cole's, Hemingway, M & M, St. Johnsbury, Service, and Cowan, respectively.

[4] Boston & Maine Railroad, New York, New Haven and Hartford Railroad Company, and the Bangor & Aroostook Railroad Company.

[5] Campbell and Lahn each filed pleadings in No. MC-113383 (Sub-No. 26). However, inasmuch as neither filed a notice of protest in that proceeding, pursuant to our rules of practice, nor appeared in person during any hearing, they are not parties of record in No. MC-113383 (Sub-No. 26), and their pleadings relative thereto shall be disregarded. Similarly, J. M. Blyth, doing business as J. M. Blyth

STATEMENTS OF FACTS

Newton is a motor common carrier authorized, as here pertinent, to transport general commodities, with exceptions, over irregular routes, between specified points in Maryland, Delaware, Pennsylvania, New Jersey, and New York, and frozen foods, over irregular routes, from, to, and between points in 13 of the involved States and the District of Columbia, as more specifically set forth in appendix A hereto. It is also authorized to transport agricultural commodities and farm produce from and to numerous points in the involved area.* Newton proceeds in both applications on the theory that it may transport frozen fruits, berries, and vegetables under its existing authority to transport general commodities, frozen foods, agricultural commodities, and farm produce, and that, both under its existing individual certificates, and by tacking certain of the authorities contained therein, it may now perform a substantial portion of the service which it seeks authority to perform in these proceedings. Newton desires (1) to ascertain whether it may, in fact, transport the involved commodities under its existing authority; (2) to acquire supplemental authority in areas which it now serves, particularly with respect to backhauls; (3) to eliminate alleged circuity resulting from the tacking of authority; (4) to receive authority to transport certain frozen food commodities without regard to the freezing

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Motor Lines, filed pleadings, but failed to establish its position as a protestant party of record in either, and its pleadings shall not be considered.

* This agricultural commodity authority is evidenced in No. MC-113388, acquired by it April 15, 1962, pursuant to No. MC-FC-64127; in No. MC-113388 (Sub-No. 2), acquired April 15, 1962, pursuant to No. MC-FC-64127; in No. MC-113388 (Sub-No. 15), issued August 20, 1963, canceling No. MC-113388 (Sub-No. 15), issued March 25, 1966; and in No. MC-113388 (Sub-No. 16), issued May 10, 1966, canceling No. MC-71881, issued June 7, 1966. Its No. MC-113388 (Sub-No. 15) certificate also authorizes the transportation of farm product.

process involved as distinguished in *Frozen Cooked Vegetables—Status*, 81 M.C.C. 649; and (5), in general, to acquire simplified, comprehensive authority for the transportation of frozen fruits, berries, and vegetables throughout the involved area.

Newton maintains a terminal at Bridgeville, Del., and operates 16 tractors and 16 trailers, 15 of which are refrigerated. It is willing to obtain additional equipment as available traffic requires. In support of the operations claimed in the "grandfather" proceeding it submitted representative abstracts of shipments of the involved commodities transported by it, as here pertinent, from January 1957 to November 1959. The abstracts are summarized in appendix B hereto. In brief, these abstracts show that Newton transported all of the involved commodities, both on and after May 1, 1958, from Exmore, Va., to Sunbury, Carnegie, York, and Williamsport, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N.Y., and from Bridgeville, Del., to Exmore. It transported frozen vegetables, both on and after May 1, 1958, from the District of Columbia to Exmore and Bridgeville; from Cambridge and Hagerstown, Md., New York City, Lancaster, Pa., and Clayton, Del., to Exmore; from Exmore to Exeter, Pa.; from Caribou, Maine, and Houston, Del., to New York City; from Caribou to Carnegie, Pa.; and from Houston to Hartford, Conn. It performed similar transportation of frozen berries from New York City to Exmore and from Exmore to Exeter. Many of the shipments shown were included in split pickups and deliveries, as shown in appendix C hereto. Although Newton contends that it may perform much of the exhibited transportation under its existing authority, such operations have been conducted without regard to limitations arising under that authority since 1956.

Two shippers support the Sub 27 application. Libby, McNeill & Libby, hereinafter called Libby, processes the involved commodities at its Houston plant, and maintains numerous warehouse facilities* throughout the involved area for the storage of these products. Its activities require the use of motor-carrier service between its Houston plant and its warehouse; for movements between warehouses; and from its plant to customers who are located throughout the involved area. In both 1958 and 1959, substantial quantities of the involved commodities produced at Houston by Libby were shipped by it between points in the subject area. Its traffic movements often require split pickups and deliveries. While the specific destinations of Libby's shipments may vary according to the demand therefor, most of its traffic moves in a north to south pattern. It has used Newton's service to meet much of its transportation needs between the points involved here, and desires both a continuation and an expansion of such service. It has also used the services of St. Johnsbury, Hemingway, Refrigerated, Cole's, M & M, Preston, and Lynn for the transportation of traffic between certain of the involved points. It finds their services to be satisfactory within the scope of their respective individual authorities. However, Libby does not feel that existing service from points in the southern States here involved is adequate to meet its transportation needs. Libby's support is motivated by its desire for single-line service, particularly with respect to shipments originating at its Pennsylvania and Maryland warehouses.

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*At Portland, Maine, Springfield, Mass., Hartford, Conn., New York, N.Y., Philadelphia, Pittsburgh, Scranton, and Harrisburg, Pa., Dover and Houston, Del., Baltimore, Landover, and Hagerstown, Md., Norfolk, Richmond, Lynchburg, and Fredericksburg, Va., Charlotte, Greensboro, Wilmington, Raleigh, Fayetteville, Asheville, and Winston-Salem, N.C., Columbia, Charleston, Greenville, and Florence, S.C., Tampa, Jacksonville, and Miami, Fla., and Atlanta, Augusta, Savannah, Columbus, and Albany, Ga.

Peter H. Dulany & Son, Inc., hereinafter called Dulany, [illegible] fresh fruit and vegetables at plants located at Bridgeville and Elsmere. It also obtains these products from growers who pack under the Dulany label. Because Dulany contracts with many co-processors in advance of harvest for its products, the locations of plants to be used in the future is not fully known. Dulany has, however, used co-processors located at Caribou and Fairfield, Maine; Centre Hall and Lititz, Pa.; Trappe, Md.; Clayton, Del.; and Rockport, N.Y. Dulany maintains several warehouses at which its products are stored, and has numerous distributors located at points throughout the forty-eight states, only a few of whose locations are disclosed on the record. Dulany's traffic moves between its plants and all points at which its co-processors, warehouses, and distributors are located, often with split pickups or deliveries. It points out that there is a steady flow of product traffic from warehouses to processing centers at Bridgeville and Elsmere. Although the total volume of traffic generated by Dulany is not of record for any given period of time, from March 1958 to February 1959 Newton transported 440 shipments of the involved commodities from or to Dulany's Elsmere and Bridgeville facilities. Dulany has named the members of protestants Lynn, Preston, Reynolds, Snyder, Campbell, St. Johnsbury, Cole's, and Bridgeport within the area involved here, and will continue the use of their services. Dulany supports the sub [illegible] primarily to obtain service to Elsmere and [illegible] to points in the involved area except those in North Carolina, South Carolina, Georgia, and Florida.

[illegible] Trappe, Md., Landover, and [illegible] Del., [illegible] and New [illegible] N.H.

PROTESTANTS' EVIDENCE

The New York, New Haven and Hartford Railroad, the Bangor & Aroostook Railroad Company, and the Boston & Maine Railroad serve points on their respective lines in New York, Connecticut, Rhode Island, Massachusetts, and Maine; interchange traffic with connecting lines; and are desirous of handling the involved traffic.

Eight motor common carriers authorized to transport the involved commodities adduced evidence in opposition to the sub 27 application. Their authority, except that expressed in terms of agricultural commodities, may be summarized as follows: Campbell is authorized to operate (1) over irregular routes, from specified points in Pennsylvania to specified points in New Jersey, New York, Maryland, Virginia, West Virginia, and the District of Columbia, and (2) over irregular routes, from a specified area in Pennsylvania to specified points in New Jersey and Delaware. Cole's is authorized to operate over regular routes, serving specified points in Maine. St Johnsbury is authorized to operate over regular routes, serving specified points in Vermont, New Hampshire, Maine, Massachusetts, New York, New Jersey, Connecticut, and Rhode Island. Hemingway is authorized to operate (1) over regular routes, serving specified points in Connecticut, Rhode Island, Massachusetts, New Hampshire, Maine, New York, New Jersey, Pennsylvania, and Delaware, and (2) over irregular routes, serving specified points and areas in New York, New Jersey, Connecticut, and Maine. M & M is authorized to operate (1) over regular routes, serving specified points in Massachusetts, Pennsylvania, Connecticut, New York, New Jersey, and Rhode Island, and (2) over irregular routes, serving a specified area in Massachusetts. Hyder is authorized to transport canned foods in containers, over irregular routes, from Hendersonville, N.C., to points in 17 States and the District of Columbia. Cowan is authorized to operate over regular routes, serving specified points in New York, New Jersey,

Delaware, Maryland, and the District of Columbia. Service is authorized to operate from, among other points, Dover, Houston, Bridgeville, and Exmore to points in Florida, Georgia, South Carolina, North Carolina, Pennsylvania, New Jersey, and New York, and to portions of Virginia, Maryland, Connecticut, Rhode Island, and Massachusetts. It is also authorized to transport the involved commodities in Dover, Houston, Bridgeville, and Exmore from portions of Virginia, New York, Connecticut, Maryland, and Pennsylvania and points in New Jersey and the District of Columbia. The pertinent certificates of these protestants are listed in appendix D hereto. All of them have adequate equipment for the transportation of the involved traffic, and have interline agreements for traffic moving from or to points beyond their own operations. Bowles, Montgomery, Odell, St. Johnsbury, Hyder, M & M, and Campbell have transported shipments for one or both of the supporting shippers.

EXCEPTION AND REPLIES

In the sub No. 1 application, the examiner recommended that applicant be authorized to transport frozen fruits, berries, and vegetables, over irregular routes, (1) from the District of Columbia, New York, N.Y., Clayton, Del., [illegible] Pennsylvania to Exmore, Va., [illegible] in New York City, and (2) [illegible] in Philadelphia, Pa., restricted [illegible] with any other authority held by applicant [illegible] the examiner recommended [illegible] to transport the same commodities (1) between points in North Carolina, South Carolina, on the one hand, and, on the other, [illegible] and Connecticut, and (2) [illegible] the District of Columbia, New York, New Jersey, Maryland, Virginia, and [illegible]

North Carolina, to Exmore, Va., and Bridgeville, Del., also restricted against tacking.

In its exceptions Newton asserts generally that its applications should be viewed by us as "a request for a single grant of authority in an area which may be served by [Newton] under certificated authority already held," and that the authority sought in both proceedings should be granted, including authority for the return of empty containers and damaged or rejected shipments. It addresses its exceptions first to the examiner's determination that the commodity descriptions "agricultural commodities" and "farm produce" do not authorize the transportation of the involved commodities. It argues that frozen fruits, berries, and vegetables were "agricultural commodities" within the meaning of section 203(b)(6) of the Interstate Commerce Act prior to the amendment thereof in 1958, citing Administrative Ruling No. 167, Bureau of Motor Carriers, March 19, 1958. It argues further that the 1958 amendment in no way revoked or modified outstanding certificates authorizing the transportation of agricultural commodities. Its claim that the involved commodities may be transported as "farm produce" is based on its theory that this description is the same as "agricultural commodities" and it cites in support of its theory *Penn-Dixie Lines, Inc., Extension—Philadelphia*, 78 M.C.C. 188.

Newton argues also that since it may transport frozen fruits, berries, and vegetables as "general commodities," "frozen foods," "agricultural commodities," or "farm produce," it may tack its outstanding certificates and thus now render service as a substantially [illegible] involved. However, it points out that such service would, at best, often involve circuitous routing through gateways, and that its tacking authority authorizing the shipment of dried or [illegible] products [illegible] it asserts that it has established a need for, and the right to [illegible] as that term is used in the Act, of greater

[illegible] a complete direct service which it is now unable to provide.

Newton contends further that the examiner failed to consider many of the shipments submitted in support of the sub 26 proceeding, and that, in addition to the grant recommended therein, it has established its bona fide operations (1) from points in Maine, New York, and Delaware to Exmore, (2) from Caribou to points in Pennsylvania, (3) from Landover to Bridgeville, Del., and Highland, N.Y., (4) from Hartford to Philadelphia, and (5) from Seabrook, N.J., to Bangor, Maine. It asserts also that it is now authorized to render a substantial outbound service from Bridgeville and Exmore; that the supporting shippers have a need for split pickups and deliveries and shipments between their various facilities; that the locations of the shippers' facilities are not static; that it has served the shippers in the past when no authority was required for such service; that it should be authorized to continue this service; and that, inasmuch as the supporting shippers will continue to use protestants' services, protestants will not be adversely affected by a grant of the authority sought.

[illegible] contends that in both proceedings, Border, [illegible] St. Johnsbury, and Refrigerated contends (1) that in the sub 26 proceeding, Newton has failed to establish that it was in bona fide operation [illegible] May 1, 1958, in the transportation of the involved commodities from Caribou to New [illegible] Philadelphia, and (2) that in the sub 28 proceeding, there is no basis for the [illegible] North Carolina and Georgia to the one hand, and, [illegible] Connecticut, and Connecticut, Pennsylvania, and points in [illegible] Protestants argue [illegible] to support its need for the supporting

shippers' transportation needs and, therefore, that no new service should be authorized. In its exceptions in the sub 27 proceeding, Campbell asserts that the recommended grant of authority from all points in Pennsylvania to Exmore and Bridgeville is unwarranted. It argues that Newton has served no Pennsylvania points within 50 miles of Centre Hall (Potter Township, Centre County), Pa., and that existing service from these points to Exmore and Bridgeville is now adequate.

In separate replies to Newton's exceptions, Labo, in the sub 27 proceeding, and Service, Border, Cole's, Hemingway, M & M, St. Johnsbury, and Refrigerated, in both proceedings, collectively contend (1) that "farm produce" may not properly be equated to "agricultural commodities," (2) that authority to transport "agricultural commodities" or "farm produce" does not encompass authority to tranport the involved commodities, (3) that Newton has failed to meet the required tests for the proposed elimination of its gateways, (4) that Newton has failed to establish a need for additional inbound authority to Bridgeville and Exmore, and (5) that the recommended restrictions against tacking should be retained. In its joint reply to protestants' exceptions, Newton reiterates the position taken in its exceptions and additionally asserts (1) that it has reasonably established that the involved traffic will move from Centre Hall (Potter Township), Pa., pointing out that Dulany uses a co-processor located at that point, and (2) that, inasmuch as protestants have not participated in the involved traffic moving between points in North Carolina, South Carolina, and Georgia, on the one hand, and, on the other, points in Maine, Massachusetts, and Connecticut, they will not be injured by the recommended grant to perform such service.[1]

[1] In its reply, Newton also argues in the event of any grant of authority filed by Labo, Cole's, Hemingway, M & M, St. Johnsbury, and Refrigerated as they apply to the sub 27 proceeding,

DISCUSSION AND CONCLUSIONS

In dealing with the issues presented in these proceedings, we are confronted with, among other things, the question of whether the authority sought here to transport fresh fruits, berries, and vegetables is duplicative of, or encompassed by, Newton's existing authority to transport agricultural commodities and farm products.

This question must be resolved in the light of the complex history of conflicting Commission and court viewpoints with respect to section 203(b)(6) of the Interstate Commerce Act and the amendment thereof in 1958. From the inception of motor-carrier regulation, part II of the act has provided an exemption from economic regulation for vehicles transporting, among other things, agricultural commodities, "* * * if such motor vehicles are not used in carrying any other property * * * for compensation * * * ." The Commission's original understanding of the foregoing statutory excerpt was that authority was required for the transportation of so-called exempt commodities if they move in a vehicle also used, *at any time*, for the transportation of so-called regulated commodities. However, in *Interstate Commerce Commission* v. *Duna*, [illegible] (6th Cir. 1948); and *Interstate Commerce Commission* v. *Service Trucking Co., Inc.*, 186 F. [illegible] (4th Cir. 1951), the Commission's original interpretation was rejected. These decisions held that transportation of so-called exempt commodities requires authority only when such items move in the same vehicle, [illegible] so-called exempt commodities.

[illegible]

Pursuant to its interpretation of part II of the act, at times this Commission granted authority to transport "agricultural commodities" or specific items or groups thereof. Such authority was granted to allow carriers to transport "commodities" which were partially exempt from regulation under section 203(b)(6) in those instances wherein the transportation was not actually "exempt" from economic regulation. See *Transport Corp. Extension—Maryland Counties*, 52 M.C.C. 751; *Emery Transp. Co. Interpretation—Frozen Eggs*, 48 M.C.C. 779. In other words, the commodity description, "agricultural commodities," was employed in grants of authority by this Commission to further the regulatory ends of section 203(b)(6). That this Commission did not consider frozen fruits, berries, and vegetables to be "agricultural commodities" within the meaning of that term as used in certificates is clear.[10] However, in *Home Transfer & Storage Co. v. United States*, 141 F. Supp. 599, affirmed, 352 U.S. 784 (November 1956), frozen fruits and vegetables were held to be agricultural commodities within the meaning of section 203(b)(6) of the act. Following the *Home Transfer* decision and others similar thereto, Congress, in 1958, amended section 203(b)(6) to exclude certain commodity classes, among which are frozen fruits, berries, and vegetables, from the partially exempt group of agricultural commodities.

In view of this Commission's past interpretation of section 203(b)(6) of the act, there is no doubt but that Newton's certificates authorizing the transportation of agricultural commodities or farm products[11] were not, at

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transportation where "exempt" and "nonexempt" commodities move in mixed shipments.

[10] See, for example, *Newton Extension—Frozen Foods*, 48 M.C.C. 726.

[11] Inasmuch as the term "farm products" is less broad than the term "agricultural commodities," and because both terms describe the products

the time of their issuance, intended to authorize the transportation of frozen fruits, berries, and vegetables. At no time was this Commission interpreted certificates such as Newton's to have been affected, [illegible] by the *Home Transfer* decision. Any possibility that they would be so interpreted was effectively removed by the fact that, in clarifying its intention with respect to section 203(b)(6), the Congress provided a "grandfather" clause for the benefit of motor carriers, such as Newton, who had been transporting the "grandfather" commodities enumerated in the amendment. Thus, we are convinced that, to accurately reflect the present statutory status of the involved commodities, we must conclude that they may not be transported by Newton under its certificates which were issued prior to the *Home Transfer* case in terms of agricultural commodities or farm produce and that such commodities must be considered in the instant "grandfather" application without regard to whether they purportedly moved under "agricultural commodities" authority between the time of the decision in the *Home Transfer* case and the 1958 amendment. It has been since 1935, and it is now, our intention to use the term "agricultural commodities" for the purpose of authorizing the transportation of commodities which are "partially exempt" from regulation under section 203(b)(6) in those instances wherein the transportation is not actually "exempt" from economic regulation.

There is no dispute here over whether the proposed transportation may be performed pursuant to Newton's certificates authorizing "general commodities" or "frozen foods." Admittedly, a commodity description may be sub-

[illegible] commodities in the so-called agricultural exemption of section 203(b)(6), our conclusions here with respect to "agricultural commodities" are equally applicable to "farm products." Compare [illegible] Agricultural Commodities, 99 M.C.C.

to be covered at the time such description is employed. Compare *Watkins Motor Lines, Inc., Interpretation of Certificate*, 64 M.C.C. 455. We are satisfied that the commodities involved may be transported pursuant to applicant's authority which is granted in terms of general commodities or frozen foods.

In the "grandfather" proceeding it is encumbent upon Newton to establish that it was in bona fide operation in the transportation which it claims on May 1, 1958, and continuously thereafter. Since we have interpreted section 7(c) of the Transportation Act of 1958 so as to maintain a substantial parity between an applicant's operations both prior and subsequent to the passage of that section, we believe that Newton should be authorized to continue its operations to the extent that it transported such involved commodity class from and to the same points both on and after the critical date as shown in our findings. In our opinion, Newton has not established its bona fide operations with respect to a sufficiently representative number of points in any of the involved States, as either an origin or a destination area, to warrant any statewide grant of authority. Although Newton, under existing authority to transport general commodities and frozen foods, may now perform a portion of the service for which it has established "grandfather" rights, it is not thus precluded from receiving similar authority; in rendering the service which forms the basis of its "grandfather" rights, it has operated in a manner unrelated to its existing certificates. We may therefore conclude that Newton's operations were bona fide within the meaning of the "grandfather" statute. Compare *R. C. Motor Lines, Inc., Extension—"Grandfather" Application*, 64 M.C.C. 82 (decided December 9, 1960).

Remaining for consideration is the subtitled proceeding in which Newton seeks an extension of authority under section 207(a) of the Interstate Commerce Act. One of the professed purposes of this application is to eliminate

the circuity which, Newton contends, would result from the performance of that portion of the proposed service which may now be accomplished through the tacking of its existing certificates. Newton hesitates to characterize this request as a formal plea for "elimination of [its] gateways." Nevertheless, this objective may not be achieved unless the prescribed tests in *Childress—Elimination of Sanford Gateway*, 61 M.C.C. 421, and *Maryland Transp. Co. Extension—Specified Commodities*, 33 M.C.C. 451, are met, and there is no real attempt here by applicant to do so.

Newton further urges an extension of its authority so that it may continue to transport these formerly "exempt" commodities for the supporting shippers, and to authorize "inbound" movements to the extent that it now holds "outbound" authority at Exmore, Bridgeville, Houston, and Dover. In view of our conclusions hereinabove, and by reference to appendix A hereto, we can see that Newton may not now transport the involved commodities to any points south of those in North Carolina. Furthermore, while the supporting shippers maintain warehouse facilities at points in Florida, Georgia, and South Carolina, neither is desirous of additional service thereto, and only Duteny exhibited any interest in service from those points. Since a minute portion of the involved traffic has been shown, in 1957, to move from points in Florida, Georgia, and South Carolina,[n] this, coupled with the preceding considerations, convinces us that no need has been established for the proposed service in this triscate area.

Our attention will thus be directed to the proposed service involving points in North Carolina and north thereof, where it is apparent that Newton's pertinent authority is concentrated, and where the bulk of the involved traffic has been shown to move.

[n] See appendix B hereto.

We may, of course, in some circumstances, consider evidence of past transportation as an indication of public need for a similar proposed service. Compare *Railway Container Carrier "Interim" Application—Sec. 7(c)*, 88 M.C.C. 480; *Iowa-Nebraska Transp. Co., Inc., Extension—Frozen Foods*, 67 M.C.C. 475. Newton has provided the proposed service at points in 10 of the involved States[1] and the District of Columbia. By reference to appendix B hereto, it is seen that, though a substantial part of its operation does not entitle it to "grandfather" rights, it has transported the involved traffic extensively, not only from the shippers' processing plants, but to them, and between others of the involved points. Considering the shippers' explanation of their traffic patterns, their utilization of split pickup and delivery service, the stated locations of their plants, warehouses, distributors, and co-processors, the large volume of traffic involved, and the shippers' shifting requirements, we are convinced that there is a need for the type of service rendered in the past by Newton within this area, except from or to Vermont and New Hampshire points because these two States are devoid of any disclosed shipper facilities and none of the involved traffic moved therein.

While we normally will not authorize a new service in the face of existing services not shown to be inadequate, circumstances may exist which compel us to depart from this policy. We cannot overlook the fact that, despite the services offered by protestants in the past, Newton's service has been largely utilized by the shippers from and to many of the points involved. Moreover, Newton has been free, during recent years, to acquire traffic on other than outbound movements and has realized revenue therefrom. Since protestants cannot be said to rely upon such traffic,

[1] Maryland, New York, New Jersey, Maine, Pennsylvania, Virginia, Delaware, Massachusetts, Connecticut, and Rhode Island.

and since the shippers have indicated that they will continue to use protestants' services as in the past, we do not believe that protestants will be injured seriously by a grant of authority enabling Newton to continue such service. We are of the opinion that Newton has established a need for the proposed service to the extent indicated in our findings. We shall note at this point that any authority granted herein to transport frozen vegetables does not authorize the transportation of those items which the *Frozen Cooked Vegetables* case, *supra*, considered to be excluded from such term.

In Ex Parte No. MC-53, *Interpretation, Operating Rights—Returned Containers*, 82 M.C.C. 677, it was determined that no authority is required for the return of empty containers. Similarly, no authority is needed to transport rejected shipments. No need has been shown for transportation for the return of any other shipments. The applications accordingly will be denied to the extent that authority is sought to transport containers and rejected and damaged shipments.

The evidence, the examiner's recommendations, the exceptions, and the replies thereto have been considered. Bearing in mind our conclusions, it is not necessary to adopt the proposed restrictions against tacking. However, to the extent that any authority granted herein duplicates any other authority held by Newton, it shall be construed as conferring but more than one operating right.

We deem it unnecessary to discuss the other matters raised by the pleadings.

FINDINGS

Based upon [illegible] we find that applicant [illegible] bona fide operation as a common [illegible] interstate or foreign commerce over irregular routes, of (1) Frozen vegetables, [illegible] Va., to Sanbury, Carnegie, York, Wil-

liamsport, and Exeter, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N.Y., (b) from the District of Columbia to Bridgeville, Del., (c) from Bridgeville and Clayton, Del., Cambridge and Hagerstown, Md., New York, N.Y., Lancaster, Pa., and the District of Columbia to Exmore, Va., (d) from Caribou, Maine, to New York, N.Y., and Carnegie, Pa., and (e) from Houston, Del., to New York, N.Y., and Hartford Conn., (2) Frozen fruits, (a) from Exmore, Va., to Sunbury, Carnegie, York, and Williamsport, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N.Y., and (b) from Bridgeville, Del., to Exmore, Va.; (3) Frozen berries, (a) from Exmore, Va., to Sunbury, Carnegie, York, Williamsport, and Exeter, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N.Y., and (b) from Bridgeville, Del., and New York, N.Y., to Exmore, Va., and has so operated since that time.

In No. MC-113388 (Sub-No. 27), we find that the present or future public convenience and necessity require operation by applicant, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, vegetables, and berries, (1) from points in Maine, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, North Carolina, and the District of Columbia to points in Virginia, Delaware, and Maryland; (2) from points in Maine, Massachusetts, and Connecticut to points in Pennsylvania; and (3) from points in Maine to points in New York; and that applicant is fit, willing, and able to properly perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder.

We further find that a single certificate authorizing applicant to transport (1) Frozen vegetables (a) from

Exmore, Va., to Sunbury, Carnegie, York, Williamsport, and Easton, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N.Y., and *(b)* from Hounton, Del., to New York, N.Y., and Hartford, Conn.; (2) Frozen fruits *(a)* from Exmore, Va., to Sunbury, Carnegie, York, and Williamsport, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N.Y., and *(b)* from Bridgeville, Del., to Exmore, Va.; (3) Frozen berries *(a)* from Exmore, Va., to Sunbury, Carnegie, York, Williamsport, and Easton, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N.Y., and *(b)* from Bridgeville, Del., to Exmore, Va.; and (4) Frozen fruits, frozen berries, and frozen vegetables *(a)* from points in Maine, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, North Carolina, and the District of Columbia to points in Virginia, Delaware, and Maryland; *(b)* from points in Maine, Massachusetts, and Connecticut to points in Pennsylvania; and *(c)* from points in Maine to points in New York should be granted; and that in all other respects the applications should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder within the time specified in the order entered concurrently herein, an appropriate certificate will be issued.

An appropriate order will be entered.

APPENDIX A

[illegible] *frozen food authority* (Sub-No. 2), General commodities, [illegible] Md., and points [illegible] and including Salisbury, Md., on

the one hand, and, on the other, Wilmington, Del., Chester, Marcus Hook, and Philadelphia, Pa., Newark and Jersey City, N.J., New York, N.Y., and Baltimore, Md.

No. MC-113388 (Sub-No. 5): Frozen foods (1) from Brockport, N.Y., to Exmore, Va., and Bridgeville, Del., (2) from Exmore, Va., and Bridgeville and Dover, Del., to Boston and Cambridge, Mass., and points in Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, and the District of Columbia, and (3) between Exmore, Va., Vineland, N.J., and Bridgeville and Dover, Del.

No. MC-113388 (Sub-No. 12): Frozen foods from Dover, Del., to points in Rhode Island, Vermont, New Hampshire, and Maine, and those in Massachusetts except Boston and Cambridge.

No. MC-113388 (Sub-No. 17): Frozen foods from Houston, Del., to Dover, Del.

APPENDIX B

Shipments transported by Lester C. Newton Trucking Co. from January 1957 to November 1959 [1]

FROZEN VEGETABLES

Origin	Destination	1957	1958 to May 1	May 2, 1958, to November 1959
Elkton (Cherrydale), Va.	Berwick, Pa.	2	2	6
Do.	Millsville, Del.		1	2
Lewes, Del.	Highland, N.Y.			2
Do.	Watertown, Mass.			1
Do.	Hartford, Conn.			1
Pocomoke, Md.	Berwick, Pa.	2		1
Hagerstown, Md.	do.	2	1	1
Do.	Glenside, Pa.			1
Salisbury, Md.	Norfolk, Va.			1
Do.	Richmond, Va.			6
Do.	do.			2
Easton, Md.	do.			2
New York, N.Y.	do.	2		1
Hackensack, N.Y.	do.			1
Rochester, N.Y.	Baltimore, Md.			1
Richmond, Va.	Norfolk, Va.	1		
Do.	Roanoke, Va.	1		
Quantico, Md.	New York, N.Y.	1	3	4
Do.	Glenside, Pa.		1	1
Do.	Reading, Pa.			7
Do.	Philadelphia, Pa.			1
Cambridge, Md.	Glenside, Pa.			1
Do.	Richmond, Va.			2
Reading, Pa.	do.	1		
Lewisburg, Pa.	do.		2	10
Bedford, Pa.	do.			1
Fredericksburg, Va.	Watertown, Mass.		1	
Glenside, Pa.	Berwick, Pa.			1
Berwick, Pa.	New York, N.Y.	1		
Do.	Jersey City, N.J.	1		
Point Pleasant, W.Va.	Cleveland, O.		1	
Do.	Akron, Pa.		1	
Watertown, Mass.	Baltimore, Md.			1
Do.	Philadelphia, Pa.			1
Hartford, Conn.	Berwick, Pa.			1
Do.	Philadelphia, Pa.			2
Greenville, Va.	Richmond, Va.	1		
Do.	Roanoke, Va.			1
Clinton, Del.	do.	2	4	1
Bridgeville, Del.	do.	4		14
Do.	New York, N.Y.			2
Do.	Baltimore, Md.			2
Berwick, Pa.	New York, N.Y.	2		2
Do.	Hartford, Conn.	1		1
Do.	Roanoke, Va.	1		

[1] Shipments of cut flowers.

APPENDIX B—Continued

Shipments transported by Lester C. Newton Trucking Co., from January 1957 to November 1959—Continued

FROZEN VEGETABLES—continued

Origin	Destination	1957	1958 to May 1	May 2, 1958, to Nov. 30, 1959
Hanover, Del.	Jersey City, N.J.	2		
Do.	Springfield, Mass.			1
Do.	Highland, N.Y.			2
Do.	Philadelphia, Pa.			1
Dover, Del.	Landover, Md.	2		
Richmond, Va.	Rimers, Va.			1
Rimers, Va.	Exeter, Pa.	2		2
Do.	Hanover, Pa.	1		
Do.	Hershey, Pa.	1		1
Do.	Carnegie, Pa.	1		2
Do.	York, Pa.	2		1
Do.	Williamsport, Pa.	1		1
Do.	Allentown, Pa.			1
Do.	Warren, R.I.	1		
Do.	Landover, Md.	1		2
Do.	Hagerstown, Md.	2		2
Do.	Frederick, Md.	1		
Do.	Baltimore, Md.			1
Do.	Elmira, N.Y.	1		
Do.	Binghamton, N.Y.	1		1
Do.	Newburgh, N.Y.	1		2
Do.	New York, N.Y.	1		12
Do.	Utica, N.Y.	1		
Do.	Herkimer, N.Y.	1		
Do.	De Witt, N.Y.	1		
Do.	Wallingford, Conn.	1		2
Do.	Lewiston, Maine	1		1
Do.	Kearny, N.J.			2
Do.	Spring Lake, N.J.			1

[1] Newton also hired certain shipments transported by it in 1958. However, such shipments are too remote from the statutory date of May 1, 1958, to establish bona fide operating statute, and will not be considered by us. See *Application Rule with Common Carrier Applicants*, 49 M.C.C. 451. Similarly, such shipments are, in our opinion, not in order to establish any material fact with respect to any present or future public need for the operations performed in the sub-F proceeding.

[2] Includes shipments originating at Washington, D.C., and in the Washington, D.C., commercial zone.

[3] Shipments also claimed by Federal Trucking Co., "grandfather" applicant in No. MC-112822 (Sub-No. 2).

[4] Frozen fruits and potatoes.

APPENDIX B—Continued

Shipments transported by Lester C. Newton Trucking Co. from January 1957 to November 1959—Continued

Origin	Destination	1957	1958	1959
New York, N.Y.	Roanoke, Va.			1
Baltimore, Md.	Roanoke, Va.	1		
Md.	Roanoke, Va.	1		
Md.	Roanoke, Va.	1		1
Md.	Roanoke, Va.	1		1
Md.	Roanoke, Va.	1		1
Md.	Roanoke, Va.	1		1
Md.	Roanoke, Va.			1
Md.	Roanoke, Va.	1		1
Md.	Roanoke, Va.	1		1
Md.	Roanoke, Va.	1		1
Md.	Roanoke, Va.	1		1
Md.	Roanoke, Va.			1
Md.	Roanoke, Va.			1
Md.	Roanoke, Va.			1
Md.	Roanoke, Va.			1
Md.	Roanoke, Va.	1		
Md.	Roanoke, Va.	1		1
Md.	Roanoke, Va.	1		1
Md.	Roanoke, Va.	1		
Md.	Roanoke, Va.	1		
Md.	Roanoke, Va.	1	

APPENDIX B—Continued

Shipments transported by Lester C. Newton Trucking Co. from January 1957 to November 1959—Continued

Origin	Destination	[illegible]	[illegible]	[illegible]
District of Columbia [1]	Kenova, W. Va.			
New York, N.Y.	do	6	1	
Middleport, N.Y.	Salisbury, Md.	1		1
Brockport, N.Y.	New York, N.Y.			1
Kenova, W. Va.	Boston, Pa.			1
Do.	Brockton, Pa.	2		2
Do.	Mahanoy, Pa.	1		
Do.	Cleveland, Ohio	2		1
Do.	York, Pa.	2		1
Do.	Williamsport, Pa.	2		1
Do.	Allentown, Pa.	1		1
Do.	Warren, R.I.			1
Do.	Lansdowne, Md.	1		
Do.	Williamsport, Md.	1		
Do.	Frederick, Md.	2		1
Do.	Baltimore, Md.	1		
Do.	Wallingford, Conn.			1
Do.	Lyndhurst, N.J.	1		1
Do.	Spring Lake, N.J.	1		1
Do.	Elizabeth, N.J.			1
Do.	Buffalo, N.Y.			1
Do.	Rochester, N.Y.	1		
Do.	Newburgh, N.Y.	1		1
Do.	Utica, N.Y.	1		1
Do.	Hamilton, N.Y.	1		
Do.	Du Quoin, N.Y.	1		
Do.	New York, N.Y.	1		
Bridgeville, Del.	Kenova, W. Va.	4		2
Do.	New York, N.Y.			1
Houston, Del.	Hartford, Conn.			1
Do.	Houston, N.J.			1
Do.	Springfield, Mass.	1		
Do.	Richford, N.Y.			2
Do.	[illegible], N.Y.			1
Do.	[illegible], Pa.			1

[1] Includes shipments originating at Washington, D.C., and to the Washington, D.C., commercial zone.

Note.—Shipments originated at Kenova, W. Va., and Bridgeville, Dover, and Houston, Del., show transportation [illegible] Shipments originated at Middleport, N.Y., and Brockport, N.Y., moved [illegible] Buffalo, N.Y., and Rochester, N.Y.

APPENDIX C

Split pickup or deliveries

Origin(s)	Destination(s)
Hagerstown, Md., Washington, D.C.	Exmore, Va.
Tyaskin, Salisbury, Md.	Exmore, Va.
Watertown, Mass., Hartford, Conn.	Houston, Del., Philadelphia, Pa.
Watertown, Mass., Hartford, Conn.	Philadelphia, Pa.
Seabrook, N.J.	Roanoke, Norfolk, Va.
Tampa, Fla.	Jersey City, N.J., New York, N.Y.
Carlton, Maine	New York, N.Y., Exmore, Va.
Carlton, Maine	New York, N.Y., Philadelphia, Pa.
Landover, Md.	Hartford, Conn., Watertown, Mass.
Plant City, Fla.	Charlotte, N.C., Philadelphia, Altoona, Pa.
Exmore, Va.	Exeter, Scranton, Sunbury, Pa.
Exmore, Va.	Hagerstown, Frederick, Md.
Exmore, Va.	Binghamton, Elmira, N.Y.
Exmore, Va.	Exeter, Williamsport, Pa.
Exmore, Va.	Utica, Herkimer, DeWitt, N.Y.
Exmore, Va.	Baltimore, Hagerstown, Md.
Exmore, Va.	Kearney, N.J., New York, N.Y.
Exmore, Va.	Oneonta, Binghamton, N.Y.
Exmore, Va.	Allentown, Exeter, Pa.
Exmore, Va.	Carnegie, Pa., New York, N.Y.
Houston, Del.	Hartford, Conn., Springfield, Mass.
Houston, Del.	New York, N.Y., Philadelphia, Pa.

APPENDIX D

Exceptants' operating certificates

Campbell

No. MC-31867, frozen fruits and vegetables; No. MC-31867 (Sub-No. 16), frozen vegetables; No. MC-31867 (Sub-No. 19), frozen vegetables; and No. MC-31867 (Sub-No. 16), issued July 12, 1950, agricultural commodities.

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[1] Shipment claimed by Federal Trucking Co.

Colet

No. MC-93632 and No. MC-93632 (Sub-No. 2), general commodities.

St. Johnsbury

No. MC-108473, No. MC-108473 (Sub-No. 3), No. MC-108473 (Sub-No. 11), No. MC-108473 (Sub-No. 12), No. MC-108473 (Sub-No. 14), and No. MC-108473 (Sub-No. 15), general commodities.

Hemingway

No. MC-30204, MC-30204 (Sub-No. 13), general commodities.

M & M

No. MC-69275, general commodities.

Hyder

No. MC-25798, (issued November 13, 1956, pursuant to No. MC-FC-59441, canceling No. MC-25798, issued January 13, 1956) frozen foods in containers, unmanufactured agricultural commodities. (The original certificate authorizing the transportation of unmanufactured agricultural commodities was issued February 26, 1943, and is embraced in No. MC-25798, issued January 13, 1956.)

Cowan

No. MC-64650, general commodities.

Service

No. MC-75185 (Sub-No. 9), issued September 9, 1948, general commodities, agricultural commodities; No. MC-75185 (Sub-No. 44) frozen fruits and vegetables, frozen foods; No. MC-75185 (Sub-No. 179), general commodities; No. MC-75185 (Sub-No. 182), issued February 29,

1954, frozen foods, agricultural commodities; No. MC-75185 (Sub-No. 204), frozen fruits; No. MC-75185 (Sub-No. 206), frozen foods; No. MC-75185 (Sub-No. 210), frozen foods; and No. MC-75185 (Sub-No. 212), issued July 25, 1955, agricultural commodities, general commodities.

M-10618

INTERSTATE COMMERCE COMMISSION

No. MC-113388 (Sub-No. 27)

LESTER C. NEWTON TRUCKING CO. EXTENSION—FROZEN FRUITS, VEGETABLES, AND BERRIES

Decided May 10, 1962

On reconsideration, findings in prior report, 84 M.C.C. 759, reversed, in part. Public convenience and necessity found not to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables between points in 11 States and the District of Columbia. Application denied.

Appearances as shown in the prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 1, COMMISSIONERS WALRATH, WEBB, AND TUCKER

TUCKER, *Commissioner:*

By application filed November 17, 1959, as amended, Lester C. Newton Trucking Co., of Bridgeville, Del., seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables,

(1) between points in New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and the District of Columbia, (2) between the points described above, on the one hand, and, on the other, points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, North Carolina, South Carolina, Georgia, and Florida, and (3) between points in Maine, Massachusetts, and Connecticut, on the one hand, and, on the other, points in North Carolina, South Carolina, Florida, and Georgia, and (4) empty containers and rejected or damaged shipments on return. The application is opposed by 12 motor carriers including Service Trucking Co., Inc., H. F. Campbell & Son, hereinafter called Service and Campbell, and by Border Express, Inc., Cole's Express, Hemmingway Bros., Interstate Trucking Co., M & M Transportation Company, St. Johnsbury Trucking Co., Inc., and Refrigerated Food Express, Inc., hereinafter individually called by abbreviated names, and collectively called the seven carriers, and by three New England railroads. In the prior report herein, 84 M.C.C. 769, decided April 28, 1961, which embraced No. MC-116383 (Sub-No. 26) wherein the applicant sought the same operating authority under the "grandfather" provisions of section 7(c) of the Transportation Act of 1958, applicant was authorized to transport frozen fruits, vegetables, and berries, from and to specified points and points in specified States and areas, as set forth in appendix A. In view of the authority also granted in the Sub-No. 26 proceeding it was further found that a single certificate should be granted embracing the total operations authorized. Upon consideration of petitions for reconsideration by applicant, by protestants, Service, Campbell and the seven carriers, and of replies [illegible] petition and by applicant to pro- [illegible] this proceeding for re- [illegible] reconsideration of the [illegible] order of the entire Commis- [illegible]

The essence of applicant's position is that [illegible] purpose of the applications [illegible] thorities respecting the transportation of the [illegible] commodities between points in the territories involved, to effect economies in operations by elimination of [illegible] routes, and to fulfill the public need for a [illegible] in the considered territories. It also appears that [illegible] operations conducted for many years in good faith under the belief that they were authorized under the terms "agricultural commodities," "farm produce," "general commodities," and "frozen foods," as contained in the present certificates, or were exempt from economic regulation under the provisions of section 203(b)(8) of the Interstate Commerce Act,* is indicative of a public need for the proposed service. Apparently, as an alternative applicant specifically contends error by the division in failing to grant authority to transport (1) the considered commodities *(a)* from points in Delaware to points in Virginia, Delaware, and Maryland, *(b)* between points in Maine, Massachusetts, and Connecticut, on the one hand, and, on the other, points in North Carolina, South Carolina, Georgia, and Florida, and *(c)* from and to points in Florida, South Carolina, Georgia, Vermont, and New Hampshire; and (2) return shipments, if any authority ultimately granted is a "from and to" operation.

In their respective petitions protestants assert that applicant has failed to show any inadequacy of existing service between points which they now serve, and that any grant of authority to applicant should be limited so as to prevent duplication of the operating rights which they

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*The questions relating to the meanings of the terms "agricultural commodities," "farm produce," "general commodities," and "frozen foods" as embraced in applicant's [illegible] and the extent of its [illegible] under [illegible] provisions of section 203(b)(8) of the [illegible] disposed of in the [illegible] the issues here, these matters will not be further discussed herein.

that they, generally, argue that the division erred in [illegible] evidence of supporting shippers' traffic [illegible] requirements for split pickup and delivery service, and of their past utilization of applicant's service from and to various points in the considered territories indicates a public need therefor, and warrants a grant of statewide authority; and they assert that the record and established precedents do not support such findings.

Service additionally contends that if any authority is granted herein, it should be restricted against tacking as the absence of such restriction would permit applicant to extend an additional competitive service to many points served by Service, without a showing of public need therefor.

Applicant and Service, in their respective replies, reiterate the position taken in their petitions.

The underlying facts are set forth in the division's and the examiner's reports. They will be restated and amplified herein only to the extent necessary for clarity of our discussion and the disposition of the issues presented.

Applicant presently holds certificates authorizing the transportation of general commodities with exceptions not here pertinent, and frozen foods from and to the specified points and territories as more fully set forth in appendix B. It maintains a terminal at Bridgeville, and operates [illegible] and 18 trailers, 15 of which are equipped with [illegible] service. It is willing to obtain additional equipment if required by available traffic.

Applicant's evidence in support of the application consisted of the testimony of two packers of frozen foods, hereinafter called the shippers, and of exhibits of past shipments of the shippers. Libby, McNeill & Libby, and John [illegible] hereinafter sometimes called Libby and

Dulany, respectively, operate packing plants and cold storage facilities at various points in the considered territories from which shipments are made to customers or distributors therein. Libby, as here pertinent, has a packing plant at Houston, Del., a large storage facility at Dover, Del., and other storage facilities at principal jobbing centers in the considered States except Rhode Island, Vermont, and New Hampshire. Dulany has packing plants at Exmore, Va., and Bridgeville, and storage facilities at various points in New York, Pennsylvania, Maryland, Virginia, North Carolina, and Florida. Dulany also purchases requirements from other packers, called copackers, to meet customers' demands. Shipments are made from packing plants to storage facilities, between storage facilities, and from packing plants or storage facilities to ultimate consignees, and, in some instances, stops are made at several points to complete loading, and to provide partial deliveries. Both shippers have been satisfied users of applicant's service, and for a period expanding from March 19, 1958, to February 1959 applicant transported 440 truckloads for Dulany. Obviously, as disclosed by exhibits later discussed, most of these shipments were transported by applicant from Bridgeville and Exmore to points embraced in applicant's present authority. Dulany, particularly, seeks extension of applicant's service in the reverse direction, and from unnamed copackers' plants to customers and distributors throughout the involved territory. In this connection, it stated that its choice of copackers' plants and the volume of shipments therefrom would change or shift depending on economic conditions and other variables. No representative of copacker plants appeared at the hearing to submit evidence relative to the quantity or quality of transportation services from or to their plants. Shippers have used the services of other carriers to transport the considered traffic within the involved territories. Libby has used St. Johnsbury, Hennigway, Refrigerated, Cole's, and Refrigerated, and three

other common carriers which are not of record. The supporting shippers have found the single-line services of these carriers satisfactory within the scope of their respective operating authority, but feel that joint-line service is inadequate, and that they need a flexible single-line service with multiple pickups and deliveries between points throughout the involved territory because of variables in production and demand and the perishable nature of their products.

Libby, admittedly, has no need for additional service to or from points in North Carolina, South Carolina, Georgia, and Florida, and its evidence lacks specificity concerning the absence of, or the inadequacy of the motor services it now uses from and to other shipping points in the involved territory. Its only complaint of existing service is that it is unaware of any single-line service between points in Southeastern States and points in New England States, but it presented no specific evidence of the volume of shipments or of any inadequate interline service by existing carriers between such points. Dulany admitted that it has utilized the joint-line service of existing carriers from Cortland, Maine, to Bridgeville and Exmore without complaint.

As illustrative of its past service transporting the commodities, applicant submitted exhibits summarizing shipments handled by it in a 24-month period ended in November 1959. Most of these shipments either moved [illegible] applicant's existing certificates, or were transported within the scope of operations for which applicant claimed "grandfather" rights as described [illegible]. However, excluding such transportation for which [illegible] authority is necessary, applicant [illegible] shipments of the involved commodities, as

Frozen vegetables

Origin	Destination	1957	1958 to May 1	May 1, 1958, to May 1, 1959
Landover, Md.	Highland, N.Y.			1
Do.	Watertown, Mass.			1
Do.	Hartford, Conn.			1
Hagerstown, Md.	Carnegie, Pa.			1
Salisbury, Md.	Norfolk, Va.			1
Do.	Kenova, Va.			1
Trappe, Md.	do.			1
Binghamton, N.Y.	do.			1
Brockport, N.Y.	Baltimore, Md.			1
Seabrook, N.J.	Norfolk, Va.	1		
Do.	Roanoke, Va.	1		
Caribou, Maine	Kenova, Va.			1
Do.	Philadelphia, Pa.			1
Caribou, Maine [1]	Carnegie, Pa.			1
Do.	Kenova, Va.			1
Scranton, Pa.	do.	1		
Sunbury, Pa.	do.			1
Pittsburgh, Pa.[1]	Watertown, Mass.		1	
Carnegie, Pa.	Kenova, Va.			1
Tampa, Fla.	New York, N.Y.	1		
Do.	Jersey City, N.J.	1		
Plant City, Fla.[1]	Charlotte, N.C.		1	
Do.	Altoona, Pa.		1	
Watertown, Mass.	Houston, Del.			1
Do.	Philadelphia, Pa.			1
Hartford, Conn.	Houston, Del.			1
Do.	Philadelphia, Pa.			1
Georgetown, Del.	Pittsburgh, Pa.	1		
Do.	Kenova, Va.			1
Houston, Del.	Scranton, Pa.	1		
Do.	Jersey City, N.J.	1		
Do.	Springfield, Mass.			1
Do.	Highland, N.Y.			1
Do.	Philadelphia, Pa.			1
Do.	Kenova, Va.			1
Richmond, Va.	Warren, R.I.	1		
Kenova, Va.	Hudson, N.Y.			1
New York, N.Y.	Warren, R.I.	1		
Kenova, Va.	Kenova, Va.	1		
Landover, Md.	Hartford, Conn.			1
Houston, Del.	Scranton, Pa.	1		
Do.	Springfield, Mass.			1
Do.	Highland, N.Y.			1
Do.	Philadelphia, Pa.			1
Do.	New York, N.Y.			1
District of Columbia [1]	Kenova, Va.	2	1	
Middletown, N.Y.	Salisbury, Md.			1
Brockport, N.Y.	New York, N.Y.			1
Kenova, Va.	Warren, R.I.	1		
Houston, Del.	Hartford, Conn.			1
Do.	Scranton, Pa.	1		
Do.	Springfield, Mass.			1
Do.	Highland, N.Y.			1
Do.	New York, N.Y.			1
Do.	Philadelphia, Pa.			1

[1] Shipments originated by Potomac Trucking Co., "groundhog" carriers in the Middle Zone [illegible] 97.
[2] Frozen fabricated potatoes.
[3] Shipments originating at Washington, D.C., and in the Washington, D.C., commercial zone.

Protestants' evidence.—Service is available from various protestants in much of the considered area. Protestants' specific pertinent authority is set forth in appendix C. All of these carriers have ample and suitable equipment for the transportation of the considered traffic and have interline agreements with connecting motor carriers

for traffic moving from or to points beyond their own operations. Service, Hemingway, Cole's, St. Johnsbury, M & M, and Campbell have transported shipments for one or both of the supporting shippers without any complaints.

Discussion and conclusions.—We are not convinced that any authority should be granted here to applicant greater than has been authorized in applicant's "grandfather" Sub-No. 26 application. The grant of authority therein was predicated up the applicant's substantial operations on and continuously since May 1, 1958, in acordance with the criteria of section 7(c) of the Transportation Act of 1958. In the present application, however, the applicant's burden is different, because it must establish convincingly that the proposed new operations are required by the public convenience and necessity. On reexamination of the record, we are not convinced that applicant's past operations were such as to warrant a grant of the relatively broad authority involved, in face of admittedly adequate existing service. Considering more closely the type of competitive service now available to perform the services involved, we now are persuaded that no new operations by this applicant should be authorized, since it is clear that no real need has been shown for any such additional service. In the factual situation presented here, general statements by the supporting shipper that they ship traffic between storage facilities or from copackers' plants to storage facilities and to their customers, and that they need flexible and single-line service between such points, do not demonstrate a need for more service than is already available to them. On the other hand, it is established that existing regular-route carriers of general commodities and irregular-route carriers authorized to transport frozen foods serve presently all points in the [illegible] territory, and that such carriers provide adequate service between points in the [illegible] territory and points in the contiguous States. Moreover, there is no specific

showing of any inadequacies in the services of such existing carriers. On the contrary, as seen, shippers are, admittedly, satisfied users of several protestants' services.

Although aware of the advantages, generally speaking, that single-line motor carrier services offer to shippers, without the concomitant showing of a present existing detriment to shippers in the form of presently inadequate for-hire motor service, we do not believe that such advantages justify the institution of a new operation. Compare *Consolidated Freightways Corp. of Del. Ext.—Frozen Foods*, 83 M.C.C. 421. Accordingly, we are not persuaded that applicant has established a need for its proposed service, and we conclude that the application should be denied.

We find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation, and that the application should be denied.

An appropriate order will be entered.

COMMISSIONER WALRATH dissenting:

The circumstances set forth in the prior division report amply justify the grant of authority made and I would affirm such report.

APPENDIX A

Authority granted in Sub-No. 26 proceeding

(1) Frozen vegetables, (a) from Exmore, Va., to Sunbury, Carnegie, York, Williamsport, and Exeter, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Riverhead, and New York, N.Y., (b) from the District of Columbia to Bridgeville, Del., (c) from Bridgeville and Clayton, Del., Cambridge and Hagerstown, Md., New York, N.Y., Lancaster, Pa.,

and the District of Columbia to Exmore, Va., *(d)* from Caribou, Maine, to New York, N.Y., and Carnegie, Pa., and *(e)* from Houston, Del., to New York, N.Y., and Hartford, Conn.

(2) Frozen fruits, *(a)* from Exmore, Va., to Sunbury, Carnegie, York, and Williamsport, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N.Y., and *(b)* from Bridgeville, Del., to Exmore, Va.

(3) Frozen berries, *(a)* from Exmore, Va., to Sunbury, Carnegie, York, Williamsport, and Exeter, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N.Y., and *(b)* from Bridgeville, Del., and New York, N.Y., to Exmore, Va.

Authority granted in Sub-No. 37 proceeding in the prior report

Frozen fruits, vegetables and berries, (1) from points in Maine, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, North Carolina, and the District of Columbia to points in Virginia, Delaware, and Maryland; (2) from points in Maine, Massachusetts, and Connecticut to points in Pennsylvania, and (3) from points in Maine to points in New York.

APPENDIX B

Applicant's general commodity and frozen food authority

No. MC- 135882 (Sub-No. 2), General commodities, with exceptions, between Princess Anne, Md., and points within 15 miles thereof, on and including Salisbury, Md., on the one hand, and, on the other, Wilmington, Del., Chester, Norristown, and Philadelphia, Pa., Newark and Jersey City, N.J., New York, N.Y., and Baltimore, Md.

No. MC-113388 (Sub-No. 5): Frozen foods, (1) from Brockport, N.Y., to Exmore, Va., and Bridgeville, Del., (2) from Exmore, Va., and Bridgeville and Dover, Del., to Boston and Cambridge, Mass., and points in Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, and the District of Columbia, and (3) between Exmore, Va., Vineland, N.J., and Bridgeville and Dover, Del.

No. MC-113388 (Sub-No. 12): Frozen foods, from Dover, Del., to points in Rhode Island, Vermont, New Hampshire, Maine, and those in Massachusetts except Boston and Cambridge.

No. MC-113388 (Sub-No. 17): Frozen foods, from Houston, Del., to Dover, Del.

APPENDIX C

Protestants' operating authorities (as here pertinent)

H. F. Campbell & Son: (1) Frozen fruits and vegetables from McAlisterville, Centre Hall, Middleburg, and Reedsville, Pa., and points within 3 miles of each to Dover, Harrington, Milford, and Wilmington, Del., Atlantic City, Camden, and Trenton, N.J., Albany, Buffalo, Rochester, and Syracuse, N.Y., Baltimore, Hagerstown, Salisbury, and Ridgely, Md., Washington, D.C., Charlottesville, Culpepper, Harrisonburg, Lynchburg, Norfolk, Petersburg, Richmond, Roanoke, and Winchester, Va., and (2) frozen vegetables (a) from points in Potter Township and Centre County, Pa., to Swedesboro and Vineland, N.J., and Georgetown, Del.; and (b) from Lititz, Pa., to Camden, N.J.

Gale's Express: General commodities between specified points over regular routes in Maine, including Caribou, Portland, Bangor, Brunswick, St. Francis, Fort Kent, Ashland, and Milford.

St. Johnsbury Trucking Company: General commodities between points in New York, and points in New England over regular routes from Newark, N.J., New York, N.Y., and New Haven, Conn., Providence, R.I., Boston, Mass., Portsmouth, N.H., and Portland and Bangor, Maine, on the south and east, Berlin, N.H., and Newport and Burlington, Vt., on the north, and Rutland and Bennington, Vt., and Springfield, Mass., on the west.

Hemingway Brothers Interstate Trucking Company: General commodities over regular routes and irregular routes between New York, N.Y., and specified points in Rhode Island, Massachusetts, New Hampshire, Maine, and Connecticut, serving intermediate and off-route points, including points in Maine within 100 miles of Waterville.

M & M Transportation Co.: General commodities over regular routes serving intermediate points and off-route points and areas between Philadelphia, Pa., and points in Massachusetts, Rhode Island, and central Connecticut.

Clay Hyder Trucking Lines, Inc.: Frozen foods, in containers, from Hendersonville, N.C., to points embraced in the application except those in Maine, New Hampshire, and Vermont.

W. T. Cowan, Inc.: General commodities, over regular routes, between Washington, D.C., and New York, N.Y., serving specified intermediate and off-route points in eastern Pennsylvania, Maryland, Delaware, and New Jersey.

Service Trucking Co., Inc.: (1) Frozen foods *(a)* from points on the Del-Mar-Va peninsula to points in Virginia west of U.S. Highway 1, and those in Connecticut, Massachusetts, and Rhode Island, except those on or within 10 miles of U.S. Highway 1 from the New York-Connecticut State line to Boston, Mass., those on or within 10 miles of U.S. Highway 5 from New Haven, Conn., to Springfield, Mass., and those on or within 10 miles of U.S. Highway 20 from Springfield to Boston; *(b)* from Bridgeville, Del.,

Cambridge, Crisfield, and Pocomoke City, Md., and Exmore, Va., to points in Florida, Georgia, North Carolina, and South Carolina; *(c)* from Dover, Del., to points in South Carolina, Georgia, and Florida; *(d)* from Salisbury, Trappe, and Baltimore, Md., and Georgetown and Milford, Del., to points in North Carolina, South Carolina, Georgia, and Florida; *(e)* from points on the Del-Mar-Va peninsula to points in Pennsylvania on and west of U.S. Highway 11, and those in New York in an area bounded on the west by a line beginning at the New York-Pennsylvania State line and extending over New York Highway 7 to Binghamton, and thence over New York Highway 12 to the United States-Canada boundary at or near Alexandria Bay, N.Y., and on and north of U.S. Highway 209 to its junction with U.S. Highway 44, and thence along U.S. Highway 44 to the New York-Connecticut State line, including points on U.S. Highways 209 and 44; and *(f)* from Salisbury, Pocomoke City, Crisfield, and Cambridge, Md., to points in New York located west of a line beginning at the New York-Pennsylvania State Line and extending along U.S. Highway 11 to Binghamton, N.Y., and thence along New York Highway 12 through Norwich, Utica, Lowville, Watertown, and Clayton, N.Y., to the international boundary at or near Alexandria Bay, N.Y., and those in New York except New York, N.Y., located east and south of a line beginning at the New York-Pennsylvania State line near Port Jervis, N.Y., and extending along U.S. Highway 209 through Port Jervis, Wurtsboro, and Wawarsing, N.Y., to its junction with U.S. Highway 44 and thence along U.S. Highway 44 through Medena, Poughkeepsie, Millbrook, and Millerton, N.Y., to the New York-Connecticut State line; (2) frozen fruits from North East, Pa., and 21 specified points in northern and western New York to Wilmington, Del., points in Virginia, and points in those portions of Maryland and Delaware on the Del-Mar-Va peninsula; (3) frozen citrus fruits *(a)* from Haines City, Fla., to

Elmore, Va.; and (b) from Highland City, Fla., to points in the District of Columbia, and points in those parts of Delaware, Maryland, New Jersey, New York, Pennsylvania, and Virginia on and east of U.S. Highway 1; (4) general commodities, (a) between Baltimore, Md., on the one hand, and on the other, points in Sussex County, Del., those in Dorchester, Somerset, Wicomico, and Worcester Counties, Md., and those in Accomac and Northampton Counties, Va.; (b) between Salisbury, Md., on the one hand, and on the other, points in Maryland, Delaware, and Accomac County within 60 miles of Salisbury; (c) from Norfolk, Portsmouth, and Richmond, Va., points in New Jersey, the District of Columbia, points in Maryland on and east of U.S. Highway 15, points in Pennsylvania within the area bounded by a line extending from the Maryland-Pennsylvania State line along U.S. Highway 15 to Sunbury, Pa., thence along U.S. Highway 11 to Scranton, Pa., thence along U.S. Highway 6 to the Delaware River, thence along the Delaware River to the Pennsylvania-Delaware State line, thence along the Pennsylvania-Delaware and Pennsylvania-Maryland State lines, to its junction with U.S. Highway 15, the point of beginning, including points and places on the highways specified, points in New York on and south of U.S. Highway 6, points in Connecticut bounded by a line commencing at the New York-Connecticut State line and extending along U.S. Highway 6 to Danbury, Conn., thence along U.S. Highway 7 to Norwalk, Conn., thence along Long Island Sound to the Connecticut-New York State line, thence along the Connecticut-New York State line to its junction with U.S. Highway 6, the point of beginning, including points on the highways specified, and points on Long Island [illegible] east of New York Highway 112, and [illegible] of the Chesapeake and Delaware [illegible] Delaware, Maryland, and Virginia east of the Chesapeake Bay, and south of the Chesapeake and [illegible]

Served May 27, 1965

M-11297

INTERSTATE COMMERCE COMMISSION

No. MC-113388 (Sub-No. 26)

LESTER C. NEWTON TRUCKING CO. COMMON CARRIER "GRANDFATHER" APPLICATION

No. MC-113388 (Sub-No. 26)[1]

LESTER C. NEWTON TRUCKING CO. COMMON CARRIER "GRANDFATHER" APPLICATION

Decided May 19, 1965

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1. On reconsideration, findings in prior report, 84 M.C.C. 759, modified.

2. On reconsideration, findings in prior report, 89 M.C.C. 269, affirmed.

3. In No. MC-113388 (Sub-No. 26), applicant found entitled to continue operations as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, from and to specified points in named States, by reason of hav-

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[1] This report also embraces No. MC-113388 (Sub-No. 27), Lester C. Newton Trucking Co. Extension—Frozen Fruits, Vegetables, and Berries.

ing been engaged in such operations on and continuously since May 1, 1958.

4. In No. MC-113388 (Sub-No. 27), public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables from and to points in named States. Application denied.

5. Issuance of a certificate embracing the authority granted in No. MC-113388 (Sub-No. 26) approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Appearances as shown in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

MURPHY, *Commissioner*:

In No. MC-113388 (Sub-No. 26), by application filed December 8, 1958, as amended, under the "grandfather" provisions of section 7(c) of the Transportation Act of 1958, Lester C. Newton Trucking Co., a corporation, of Bridgeville, Del., seeks a certificate of public convenience and necessity authorizing the continuance of operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, (1) between points in New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and the District of Columbia, (2) between the points described above, on the one hand, and, on the other, points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, North Carolina, South Carolina, Georgia, and Florida, (3) between points in Maine, Massachusetts, and Connecticut, on the one hand, and, on the other, points in North Carolina, South Caro-

lina, Florida, and Georgia, and (4) empty containers and rejected or damaged shipments on return. In No. MC-118888 (Sub-No. 27), by application filed November 17, 1959, as amended, applicant seeks a certificate of public convenience and necessity covering precisely the same operations for which authority is sought in the title proceeding. Numerous protestants[3] oppose both applications.

The instant proceedings were heard on a consolidated record and made the subject of single report and recommended order by the examiner. In a prior report, 84 M.C.C. 759, decided April 28, 1961, division 1 granted applicant authority in the title proceeding to transport (1) frozen vegetables, *(a)* from Exmore, Va., to Sunbury, Carnegie, York, Williamsport, and Exeter, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N.Y., *(b)* from the District of Columbia to Bridgeville, Del. *(c)* from Bridgeville and Clayton, Del., Cambridge and Hagerstown, Md., New York, N. Y., Lancaster, Pa., and the District of Columbia to Exmore, Va., *(d)* from Caribou, Maine, to New York, N. Y., and Carnegie, Pa., and *(e)* from Houston, Del., to New York, N. Y., and Hartford, Conn., (2) frozen fruits, *(a)* from Exmore, Va., to Sunbury, Carnegie, York, and Williamsport, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston,

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[3] Both applications are opposed by T. M. Zimmerman Company, Victor Lynn Lines, Inc., Preston Trucking Company, Inc., Clay Hyder Trucking Lines, Inc., Border Express, Inc., Refrigerated Food Express, Inc., Cole's Express, Hemingway Brothers Interstate Trucking Co., M & M Transportation Company, St. Johnsbury Trucking Co., Inc., Service Trucking Co., Inc., W. T. Gowan, Inc., Boston and Maine Railroad, New York, New Haven and Hartford Railroad Company, and Bangor and Aroostook Railroad Company. In addition, The Adley Express Company, Capitol Motor Transportation Company, Hunnewell Trucking Co., and Maine Central Railroad Company oppose the title application, and H. F. Campbell & Son and Lahn Transportation Co. oppose the alternate application.

Maine, and Binghamton, Newburgh, and New York, N. Y., and (b) from Bridgeville, Del., to Exmore, Va., and (3) frozen berries, (a) from Exmore, Va., to Sunbury, Carnegie, York, Williamsport, and Exeter, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewiston, Maine, and Binghamton, Newburgh, and New York, N. Y., and (b) from Bridgeville, Del., and New York, N. Y., to Exmore, Va. In the subtitled proceeding in the same report applicant was granted authority to transport frozen fruits, frozen vegetables, and frozen berries (1) from points in Maine, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, North Carolina, and the District of Columbia to points in Virginia, Delaware, and Maryland, (2) from points in Maine, Massachusetts, and Connecticut to points in Pennsylvania, and (3) from points in Maine to points in New York.

Petitions for reconsideration of the title proceeding were denied by the entire Commission on March 1, 1962. By order of December 22, 1961, the Commission, division 1, reopened the subtitled proceeding, and in its report, 89 M.C.C. 208, decided May 10, 1962, denied the application in its entirety. A petition for reconsideration was denied by the entire Commission on September 24, 1962. Applicant filed an action seeking review of the Commission's findings in the United States District Court for the District of Delaware, civil action No. 2508, Lester C. Newton v. United States, and on October 12, 1962, the court temporarily enjoined the Commission from allowing the orders of April 26, 1961, and May 10, 1962, to become effective. By order of August 25, 1964, the Commission on its own motion reopened both of the instant proceedings for reconsideration on the existing record. The court action has been stayed pending the disposition of the instant proceedings herein.

The evidence in these proceedings has been fully and accurately set forth in the prior reports, except that seven

shipments[1] of frozen vegetables transported by applicant prior to 1957 were not included in the appendixes to the first division report. Accordingly, no detailed restatement of the evidence will be made here.

BACKGROUND OF THE PROCEEDINGS

Applicant is an irregular-route motor common carrier holding extensive authority, as pertinent, to transport commodities requiring refrigeration between points in numerous States along the east coast. More specifically, its certificates encompass authority to transport general commodities and frozen foods between certain points involved in the instant applications, as set forth in the appendix hereto, and also to transport agricultural commodities and farm produce between certain points in the area under consideration. Applicant takes the position (and has operated since prior to the critical date in accordance with such understanding) that each of the four above-mentioned commodity descriptions authorizes the transportation of frozen fruits, vegetables, and berries. It seeks by the applications before us to supplement existing operating rights and thus to obtain complete authority for the movement of those commodities throughout the involved area.

Two shippers appeared in support of applicant's request for authority. John H. Dulany & Son, Inc., ships the commodities involved from its Bridgeville and Exmore processing plants to 10 company-maintained warehouses and to distributors in the territory, and shipments are also made from co-processors at other varying points to the 10 warehouses as well as to warehouses at Exmore and Bridgeville. Dulany's traffic also moves to its plants from

[1] One shipment from Trappe, Md., to Hartford, Conn., four from Seabrook, N. J., to Bangor, Maine, one from Seabrook to Pittsfield, Maine, and one from Bangor to Waterbury, Conn., all moved in 1956.

co-packers, warehouses, and distributors. Its primary interest is in obtaining a continuation of applicant's interstate service to Ramsey and Bridgeville from points in the involved area in and north of Virginia. Libby, McNeill & Libby ships the considered commodities from its processing plant at Houston, Del., to warehouses at a number of points throughout the territory under consideration here, between the said warehouses, and from its plant to customers in the area. It has used applicant's service with satisfaction and desires its continuation. Libby's requirements may fluctuate as origin and destination points shift from time to time. Both shippers require split pickups and delivery service, and both express general satisfaction with the quality of service provided by existing carriers to the extent they are authorized.

DISCUSSION AND CONCLUSIONS

We have recently reviewed the statutory standards of section 7(c) of the Transportation Act of 1958 in *Willis Shaw Frozen Exp., Inc., Com. Car. Application*, —— M.C.C. —— (decided February 2, 1965), on remand from the United States Supreme Court in *Willis Shaw Frozen Exp., Inc. v. United States*, 377 U.S. 159. As particularly pertinent herein, we found in that proceeding: (1) that the question of remoteness of shipments should not be subject to an inflexible rule generally applicable to all "grandfather" proceedings, but should be considered in the light of the attendant circumstances in each proceeding; (2) that frozen fruits, berries, and vegetables may be found, as a matter of fact, to have been handled as a single commodity class, although such a finding is not required as a matter of law; and (3) that, as concluded by the Supreme Court in *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, the characteristics of the transportation service rendered are relevant to the territorial scope of the operations to be authorized. We are per-

suaded that our findings in the *Shaw* case necessitate reevaluation of the instant proceedings.

In the prior report, 84 M.C.C. 759, division 1 found that frozen fruits, berries, and vegetables may properly be transported under the commodity descriptions "general commodities" and "frozen foods" but not under "agricultural commodities" or "farm products." We concur in those findings, and, accordingly, they will not be further discussed herein.

The "grandfather" application.—Looking first at applicant's "grandfather" operations as established in the title proceeding, it is clear that all shipments of frozen fruits, berries, and vegetables transported by applicant, including those few in 1956, must be considered if a truly accurate picture of its overall operations is to be seen, regardless of whether certain shipments of those commodities might have been transported under certificated authority. To exclude from consideration shipments which might have been transported under authority then held by applicant would create a fragmented and distorted view of the totality of applicant's operation and constitute a serious impediment to the achievement of substantial parity between applicant's past and future service. Indeed, such a conclusion would, in effect, penalize applicant for holding certificates authorizing broad "general commodity" and "frozen food" authority.

In determining the characteristics of the service which applicant has performed in the transportation of the "grandfather" commodities here involved, it is significant, we believe, that applicant's operations have been performed principally for the two shippers which appeared in support of the application in the subtitled proceeding. A large portion of the traffic has moved between production and processing points and from such points to storage facilities at various points throughout the considered ter-

rieries. Shippers are engaged in the production and distribution of all three of the involved commodities at their main shipping points. While shipments inbound to these points and between storage points have consisted predominately of frozen vegetables, we are nevertheless inclined to believe that the evidence considered as a whole supports the view that the three involved commodities have been handled by applicant as a single class, and they will be so regarded herein.

The only shipments shown to have been moved by applicant from Connecticut and Massachusetts were one to Houston, Del., and two to Philadelphia, Pa., from Hartford, Conn., and Watertown, Mass., (split pickups), both after the critical date. These movements are insufficient to show operations on the critical date from this territory. Movements from Corinna, Maine, all consisted of french fried potatoes, a commodity not encompassed by the "grandfather" act. See *Lester C. Newton Trucking Co. v. United States*, 209 F. Supp. 600, affirmed *per curiam*, 372 U.S. 702. Shipments also moved from Caribou, Maine, to New York City and Carnegie, Pa., before and after the critical date, and from Caribou to Exmore and Philadelphia and from Bangor to Watertown subsequent thereto. No authority is warranted from Maine origins in addition to that granted under the "grandfather" clause in the prior report. Split loads from Tampa, Fla., to New York and Jersey City and from Plant City, Fla., to Philadelphia, Altoona, Pa., and Charlotte, N. C., both before the critical date, are not indicative of continuous operations from that territory for which "grandfather" rights should be granted.

Operations from four widespread New York points to three points in applicant's principal origin territory (see below) have been sufficient, we believe, to indicate an area-wide pattern of service. We recognize that only from New York City did shipments originate both before and

after the critical date, but in light of applicant's service between scattered storage and distribution points, we believe authority with respect thereto is warranted. Shipments from four Pennsylvania points (two before and three after the critical date) moved to Exmore, and while only one point was served both prior and subsequent to May 1, 1958, we believe a statewide grant to Exmore should be made. A split load from Seabrook, N. J., to Norfolk and Roanoke, Va., in 1957 and two split loads to Bangor and Pinepoint, Maine, in 1956 are not demonstrative of continuous operations justifying a "grandfather" grant.

There remains for consideration applicant's shipments from Delaware, the District of Columbia, Maryland, and Virginia. The sole shipment from this territory from other than the District, points on the Delmarva Peninsula, and other Maryland points was one shipment from Richmond to Exmore subsequent to the critical date. While a large number of these shipments originated at Exmore, we are convinced that the characteristics of applicant's overall operation demonstrate service from the territory described rather than on the point-to-point basis utilized in the prior report. Accordingly, our determination of the outbound "grandfather" authority to be granted from the Delmarva Peninsula, the District of Columbia, and other points in Maryland will be based on operation from that territory considered as a single unit.

Shipments to Hartford and Wallingford, Conn., provide a sufficient basis for authorization of operating rights with respect thereto, but no area-wide operation is indicated. Similarly, operations to Lewiston, Maine, justify authority to that point only. Shipments to Watertown and Springfield, Mass., after the critical date, and to Warren, R. I., before the critical date, are insufficient to meet the statutory requirement of continuous service on and since the critical date. Movements to a number of

representative New York and Pennsylvania points, several both before and after the critical date, establish statewide operations thereto. Shipments to the Kearney-Jersey City, N. J., area (contiguous municipalities) before and after the critical date establish ample basis for authorization thereto, but a single shipment to Spring Lake, N. J., in 1959 appears to have been an isolated one which does not, in our opinion, warrant additional rights.

Substantial operations have been conducted between points in the above-described origin territory. Shipments have moved to Exmore from the District of Columbia, Cambridge, Hagerstown, Salisbury, Trappe, and Landover, Md., and Georgetown, Clayton, and Bridgeville, Del.; to Bridgeville, Del., from the District of Columbia; and to several Maryland points from Exmore, Dover, and Bridgeville. We are persuaded that, when viewed in the light of applicant's overall pattern of operations and the characteristics of its service for the two supporting shippers in the extension proceeding, these operations provide a sufficient basis for non-radial authority between points in the territory described.

The operating rights authorized herein are to some extent duplicative of authority presently held by applicant, but elimination of such duplication would result in an unwieldy, complicated certificate and does not appear to be administratively desirable. The authority granted herein, to the extent it duplicates authority presently held by applicant, shall not be construed as conferring more than a single operating right.

The extension proceeding.—Pursuant to certificates now in force and the "grandfather" rights authorized herein, applicant may now perform a large part of the service proposed in the subdivided proceeding, either directly or by tacking of the rights held. However, it seeks to supplement these authorities so as to be able to serve the more extensive territories described in its application.

At the outset, we are compelled to concur with the conclusion of the prior report, 89 M.C.C. 289, that applicant has failed to demonstrate with any reasonable degree of specificity that the service afforded by existing carriers is inadequate. Indeed, existing regular- and irregular-route common carriers provide direct service for the transportation of frozen foods at virtually all points in the Middle Atlantic States and offer interline arrangements for movements between southern and New England States, and shippers admit their satisfaction with these services to the extent authorized. A mere preference for single-line service, of course, is not sufficient to show inadequacy of joint-line service, in the absence of demonstrated service deficiencies. It is apparent, therefore, that any claim of public need for the proposed service based on an asserted lack of satisfactory service must fail.

Applicant takes the position that its past service for the supporting shippers is indicative of a public need for the service proposed. The past operations relied upon are said to have been performed (1) under the partial exemption of section 203(b)(6), (2) under its undisputed right to transport "frozen foods" and "general commodities," and (3) under its mistaken interpretation of "agricultural commodities" and "farm produce." There can be no question that past operations, even though unauthorized, performed under color of right are a proper factor to be considered in a determination of public convenience and necessity, and this Commission has so held on a number of occasions. See, for example, *Bowman Transp., Inc., Extension—Five Point Authority*, 92 M.C.C. 651, and *Merrifield Common Carrier Application*, 61 M.C.C. 103. Such operations, however, cannot be considered in themselves as controlling the issue of public convenience and necessity, but must be considered along with other factors relevant to the question of public need. See *D. A. Beard Truck Lines Co. Com. Car. Applic.—New Operation*, 34

M.C.C. 396, 397. Cf. also *Crawford Common Carrier Application*, 81 M.C.C. 793, and *Beverage Transp., Inc., Extension—Trenton, N. J.*, 73 M.C.C. 778.

In the instant situation the scope of the underlying operations relied upon has been shown by applicant in its exhibits setting forth representative shipments (or, as to some territories, *all* shipments) transported by it on and subsequent to the "grandfather" date. We have liberally construed the "grandfather" act in authorizing the transportation of frozen fruits, berries, and vegetables in the title proceeding. There are very few points or territories at which *any* service has been shown to have been provided by applicant which are not covered by our grant of authority in that proceeding. We are unable to conclude that the evidence of past operations demonstrated herein, though concededly performed in good faith, including both documentary data and the supporting oral testimony of shippers, is sufficient to overcome what appears to be an abundance of satisfactory motor carrier service by existing operators. It is true that carriers now in the field cannot be said to be deprived of traffic presently handled by applicant, but applicant apparently has not provided any substantial service beyond that now authorized. In the circumstances, we are impelled to conclude that the extension application must be denied.

FINDINGS

In No. MC-118383 (Sub-No. 26), on reconsideration, we find that applicant was, on May 1, 1958, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, (1) from Caribou, Maine, to New York, N. Y., and Carnegie, Pa., (2) from points in New York to the District of Columbia, points in Maryland and Delaware, and those in Virginia on the Delmarva Peninsula, (3) from points in Pennsyl-

vania to Exmore, Va., (4) from the District of Columbia, points in Maryland and Delaware, and those in Virginia on the Delmarva Peninsula to Hartford and Wallingford, Conn., Lewiston, Maine, Kearney and Jersey City, N. J., and points in New York and Pennsylvania, and (5) between points in Maryland, Delaware, those in Virginia on the Delmarva Peninsula, and the District of Columbia; that a certificate authorizing the continuance of such operations should be granted; and that the application in all other respects should be denied.

In No. MC-113388 (Sub-No. 27), on reconsideration, we find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation, and that the application should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder within the time specified in the order entered concurrently herein, an appropriate certificate will be issued.

An appropriate order will be entered.

APPENDIX

Applicant's "general commodities" and "frozen food" authority

No. MC-113388 (Sub-No. 2): General commodities, with exceptions, between Princess Anne, Md., and points within 15 miles thereof, not including Salisbury, Md., on the one hand, and, on the other, Wilmington, Del., Chester, Marcus Hook, and Philadelphia, Pa., Newark and Jersey City, N. J., New York, N. Y., and Baltimore, Md.

No. MC-113388 (Sub-No. 5): Frozen foods, (1) from Brockport, N. Y., to Exmore, Va., and Bridgeville, Del., (2) from Exmore, Va., and Bridgeville and Dover, Del.,

to Boston and Cambridge, Mass., and points in Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, and the District of Columbia, and (8) between Exmor, Va., Vineland, N. J., Bridgeville and Dover, Del.

No. MC-113388 (Sub-No. 12): Frozen foods, from Dover, Del., to points in Rhode Island, Vermont, New Hampshire, Maine, and those in Massachusetts except Boston and Cambridge.

No. MC-113388 (Sub-No. 17): Frozen foods, from Houston, Del., to Dover, Del.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of May A.D. 1965.

No. MC-113388 (Sub-No. 26)

LESTER C. NEWTON TRUCKING CO. COMMON CARRIER "GRANDFATHER" APPLICATION

No. MC-113388 (Sub-No. 27)

LESTER C. NEWTON TRUCKING CO. EXTENSION—FROZEN FRUITS, VEGETABLES, AND BERRIES

It appearing, That on April 28, 1961, the Commission, division 1, made and filed its report, 84 M.C.C. 759, and order in the above entitled proceedings, granting each application in part;

It further appearing, That on May 10, 1962, on reconsideration in No. MC-113388 (Sub-No. 27), the Commission, division 1, made and filed its report, 89 M.C.C. 269, and order in the said proceeding, denying the application in its entirety;

It further appearing, That on August 25, 1964, the Commission on its own motion reopened the above-entitled proceedings for reconsideration on the existing record;

And it further appearing, That full investigation of the matters and things involved in the above-entitled proceedings has been made, and the Commission, on the date hereof, has made and filed a report on reconsideration herein, containing its findings of fact and conclusions thereon, which report, and the reports of April 28, 1961, and May 10, 1962, are hereby referred to and made a part hereof:

It is ordered, That the application in No. MC-113388 (Sub-No. 26), except to the extent granted herein, be, and it is hereby, denied, effective July 8, 1965;

It is further ordered, That the application in No. MC-113388 (Sub-No. 27) be, and it is hereby, denied;

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report on reconsideration in No. MC-113388 (Sub-No. 26) shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 2508

LESTER C. NEWTON TRUCKING COMPANY, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

(March 7, 1967)

H. JAMES CONAWAY of YOUNG, CONAWAY, STARGATT AND TAYLOR of Wilmington and H. CHARLES EPHRAIM of Washington, D. C. for plaintiff.

ALEXANDER GREENFELD, United States Attorney, Wilmington, JOHN H. D. WIGGER, Department of Justice, and DONALD F. TURNER of Washington for defendant, United States of America.

ROBERT W. GINNANE, General Counsel, BETTY JO CHRISTIAN and JOHN E. FAULK of Washington, D. C. for defendant, Interstate Commerce Commission.

Before SEITZ, *Circuit Judge*, and WRIGHT, *Chief District Judge* and STEEL, *District Judge*.

SEITZ, *Circuit Judge*:

Plaintiff corporation Lester C. Newton Trucking Company ("Newton") brings this action to set aside an order of the Interstate Commerce Commission and to remand the proceedings to the Commission for interpretation or amendment of its certificate of public convenience and necessity to include authority "enabling continued com-

plete service by it throughout the territory in which it operates" as a motor carrier of frozen fruits, frozen berries, and frozen vegetables.[1] This is the decision of the district court which has jurisdiction under 28 U. S. C. A. § 1336 and which is composed of three judges as required by 28 U. S. C. A. § 2325 and as constituted pursuant to 28 U. S. C. A. § 2284.

The United States and the Interstate Commerce Commission, defendants, admit that Newton as required by 49 U. S. C. A. §§ 17(9), 305(g) and (h) has exhausted its administrative remedies through proceedings begun back in 1958. Newton filed with the Commission a "grandfather" application under § 7(c) of the Transportation Act of 1958 (P. L. 85-625; 72 Stat. 568), and later a second application pursuant to 49 U. S. C. A. § 307 seeking an extension of its authority in the event it was not satisfied with the scope of its existing authority as determined in the "grandfather" proceedings. The "grandfather" and extension proceedings were consolidated and division 1 of the Commission granted Newton limited authority under the "grandfather" provision (84 M. C. C. 759). Division 1 also granted certain new authority in the extension proceedings, but then reversed itself and denied Newton's extension application in its entirety (89 M. C. C. 269). Newton thereupon filed the present action. Thereafter, the Commission on its own motion reconsidered its prior orders, modifying the order on Newton's "grandfather" application and again denying Newton's extension application (98 M. C. C. 702). Still not satisfied, Newton filed a supplement to its original complaint by which it sought to set aside the latest Commission order. It is that order we now consider.

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[1] A certificate of public convenience and necessity issued by the Interstate Commerce Commission is a prerequisite to interstate operations as a common carrier by motor vehicle in the transportation of all commodities unless the transportation is specifically exempt from Commission regulation. 49 U. S. C. A. § 306(a)(1).

Newton advances three arguments in support of its contention that the Commission erred in refusing to grant broad authority for transportation of frozen fruits, berries, and vegetables throughout some sixteen Eastern states. Newton first declares that its present certificates should be construed to grant authority to transport frozen fruits, berries, and vegetables not only under the commodity descriptions "general commodities" and "frozen foods", as the Commission held, but also under the headings of "agricultural commodities" and "farm produce", which the Commission denied. [If we accepted this first argument that Newton's present certificates already authorize the desired full scope of transporattion, it would of course become unnecessary to proceed further to Newton's second and third arguments under the "grandfather" and extension provisions, respectively.]

Newton's first argument based on its outstanding certificates requires reference to § 203(b)(6) of the Interstate Commerce Act. This section excepted from regulation under the Act

> "motor vehicles used in carrying property consisting of . . . agricultural . . . commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation."

The Interstate Commerce Commission adopted a strict construction of this exception in two of its aspects. First, the Commission interpreted the exemption to apply only to the carrying of agricultural commodities in vehicles never used for carrying non-exempt products (i.e., in vehicles which were not "tainted"). Second, the Commission interpreted the exemption to apply only to agricultural commodities essentially in their natural state.

The courts, however, adopted a more liberal approach toward this exception. As to the first aspect, the courts held that the exemption extended to all transportation of

exempt agricultural commodities even in "tainted" vehicles except in mixed loads with non-exempt products. Interstate Commerce Commission v. Dunn, 166 F.2d 116 (5th Cir. 1948); Interstate Commerce Commission v. Service Trucking Co., Inc., 186 F.2d 400 (3rd Cir. 1951). This judicial interpretation has not been altered by later judicial or Congressional developments and remains the law today. As to the second aspect, the courts held in a series of decisions that various degrees of processing did not remove agricultural products from the agricultural commodities exception. For example, it was held that the exemption covered otherwise exempt agricultural commodities in a fresh frozen state. Home Transfer & Storage Co. v. United States, 141 F. Supp. 599 (D. C. Wash. 1956), aff'd. per cur., 352 U. S. 884 (1956); Frozen Food Express v. United States, 148 F. Supp. 399 (D. C. Texas 1956), aff'd. per cur. 355 U. S. 6 (1957).

In order to halt the continued expansion of the agricultural commodities exemption and to return to regulation some eleven items including frozen fruits, berries, and vegetables, Congress passed the Transportation Act of 1958.[3] A savings clause was provided to give effect to

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[3] Section 7(a) provides as follows:

"Clause (6) of subsection (b) of section 203 of the Interstate Commerce Act, as amended, is amended by striking out the semicolon at the end thereof and inserting in lieu thereof a colon and the following: '*Provided*, That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107 March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": *Provided further*, however, That notwithstanding the preceding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea,

certain certificates which the Commission had issued under its assumption of jurisdiction but which contrary judicial decisions prior to the Transportation Act had held were not required.[3] In addition, a "grandfather" clause was provided to protect carriers who had been engaged without certificates of authority in the *bona fide* transportation of commodities theretofore exempt from regulation but thereafter to be subject to the Commission's jurisdiction.[4]

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bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products);'."

[3] Section 7(b) provides as follows:

"Unless otherwise specifically indicated therein, the holder of any certificate or permit heretofore issued by the Interstate Commerce Commission, or hereafter so issued pursuant to an application filed on or before the date on which this section takes effect, authorizing the holder thereof to engage as a common or contract carrier by motor vehicle in the transportation in interstate or foreign commerce of property made subject to the provisions of part II of the Interstate Commerce Act by paragraph (a) of this section, over any route or routes or within any territory, may without making application under that Act engage, to the same extent and subject to the same terms, conditions and limitations, as a common or contract carrier by motor vehicle, as the case may be, in the transportation of such property, over such route or routes or within such territory, in interstate or foreign commerce."

[4] Section 7(c) provides as follows:

"Subject to the provisions of section 210 of the Interstate Commerce Act, if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act by paragraph (a) of this section, in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant

The specific problem raised by Newton's first argument is to determine as a matter of statutory construction of section 7(b) of the Transportation Act of 1958 the extent to which Newton may transport frozen fruits, berries, and vegetables under the certificates it held before the effective date of the Act in 1958. In the 1930s Lester C. Newton, the proprietor of the business which later was incorporated, obtained a certificate authorizing the transportation of numerous special products and agricultural commodities. After the development of processes for the freezing of foods, Newton in the early 1940s sought permission to transport fresh frozen berries, fruits and vegetables and other frozen products under its then existing "agricultural commodities" authority. In Newton Extension-Frozen Foods, 43 M. C. C. 787 (1944), the Commission denied that these frozen items were exempt agricultural commodities, but granted Newton certain new authority to transport frozen products under "general commodities" and "frozen foods" clauses. It is this "general commodities" and "frozen foods" authority which Newton under the Commission's construction of § 7(b)

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or its predecessor in interest had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect. Pending the determination of any such application, the continuance of such operation without a certificate or permit shall be lawful. Any carrier which on the date this section takes effect is engaged in an operation of the character specified in the foregoing provisions of this paragraph, but was not engaged in such operation on May 1, 1958, may under such regulations as the Interstate Commerce Commission shall prescribe, if application for a certificate or permit is made to the said Commission within one hundred and twenty days after the date on which this section takes effect, continue such operation without a certificate or permit pending the determination of such application in accordance with the provisions of part II of the Interstate Commerce Act."

relating after the Transportation Act of 1958 removed the exemption of frozen fruits, berries and vegetables.

Newton argues that a re-evaluation of its certificates is required as a result of the judicial interpretations of the agricultural commodities exemption subsequent to the Commission's ruling in the Newton extension case of 1944. Newton contends that the moment before the effective date of the Act the "agricultural commodities" clause in its certificates included frozen fruits, berries, and vegetables. Therefore, Newton concludes, it may continue to engage in the transportation of these frozen products under its "agricultural commodities" and "farm produce" authorities which are preserved by 5.7(b).

The Commission responds to Newton's argument by attacking the proposition that the moment before the effective date of the Act the "agricultural commodities" clause in Newton's certificates encompassed frozen fruits, berries and vegetables. Division 1 argued that Newton's "agricultural commodities" certificates were issued at a time when frozen fruits, berries, and vegetables were not considered to be within that class:

"In view of this Commission's past interpretation of section 203(b)(9) of the act, there is no doubt but that Newton's certificates authorizing the transportation of agricultural commodities or farm produce [illegible] at the time of their issuance, intended to authorize the transportation of frozen fruits, berries, [illegible] 194 M. C. C. 769, 785, confirmed 98 [illegible] 302, 305).

The implication of the Commission's argument is that "agricultural commodities" certificates would be saved by section 5(b) [illegible] since the 1958 judicial decisions [illegible] frozen fruits, berries, and vegetables were [illegible] that date. In fact, the Commission has so held, [illegible] Chesapeake Motor Lines,

Inc., Common Carrier "Grandfather" Application, 89 M. C. C. 227 (1962).

We find some difficulty in accepting the Commission's interpretation that the coverage of the "agricultural commodities" clause remains fixed as of the time of issuance of such a certificate. ["Agricultural commodities" are those products, whatever they might be at any point in time, which are exempt under § 203(b)(6) of the Interstate Commerce Act when carried in straight loads. Therefore, the purpose of a Commission "agricultural commodities" certificate can only be to authorize the transportation of these items in mixed loads with non-exempt goods." As judicial or legislative changes are made in the items encompassed within the "agricultural commodities" exemption of the Interstate Commerce Act, it is arguable that there are corresponding changes in the coverage of "agricultural commodities" certificates. Accordingly, it might well be concluded that the moment before the effective date of the Transportation Act of 1958 Newton's "agricultural commodities" and "farm product" authorities permitted transportation of frozen fruits, berries, and vegetables in mixed loads with non-exempt products.]

However, we find it unnecessary to resolve this issue as to the coverage of Newton's "agricultural commodities" certificates. Assuming *arguendo* that frozen fruits, berries, and vegetables are included, we conclude from the language and legislative history of the Transportation Act of 1958 that § 7(b) does not save this "agricultural commodities" authority to haul frozen fruits, berries, and vegetables in mixed loads with non-exempt products.

[illegible] has been since 1958, and it is now, our intention to use the term agricultural commodities for the purpose of authorizing the transportation of commodities which are partially exempt from regulation under section 203(b)(6) of the Interstate Commerce Act (84 M. C. C. 739, 742 and cases cited; 85 M. C. C. 703, 706); see also Penn-Dixie Lines, Inc., Extension—Philadelphia, 78 M. C. C. 165, 168 (1958).

Section 7(b), like section 7(c), refers to the "transportation . . . of property made subject to the provisions of part II of the Interstate Commerce Act by paragraph (a) of this section." Thus, we think the Commission reached the correct conclusion that Newton could continue the transportation of frozen fruits, berries, and vegetables in straight loads under certificates authorizing the transportation of "general commodities" and "frozen foods". Such certificates authorize the transportation of "property made subject to" the Interstate Commerce Act because the transportation in straight loads of certain "frozen foods" and "general commodities" had been held to be exempt by the courts and was made subject to regulation by the Transportation Act of 1958. By the same token, we believe the Commission reached the correct conclusion that Newton could not continue the transportation of frozen fruits, berries, and vegetables in mixed loads with non-exempt products under certificates authorizing the transportation of "farm produce" and "agricultural commodities." [Such certificates do not authorize the transportation of "property made subject to" the Interstate Commerce Act because the transportation of "farm produce" and "agricultural commodities" in mixed loads with non-exempt products had not been held to be exempt by the courts but was already regulated prior to the Transportation Act of 1958.]

The legislative history of the Transportation Act of 1958 also supports the conclusion that section 7(b) did not save Newton's authority to transport frozen fruits, berries, and vegetables in mixed loads with non-exempt products under its "farm produce" and "agricultural commodities" certificates. House Report No. 1922 indicates that the amendment of 49 U. S. C. A. § 303(b)(6) "[removes] the so-called agricultural exemption from motor carrier regulation by the Commission to the present list of exempt [items] except for a 'roll-back' on frozen fruits, frozen berries, frozen vegetables * * *" (i.e., these articles

would no longer be exempt." 1958 U. S. Code Cong. and Admin. News 3457. Other passages from this report make it clear that the Transportation Act of 1958 was intended to "overrule" the *Howe Transfer* and *Frozen Foods* cases which had exempted frozen fruits, berries, and vegetables when carried in straight loads. There is absolutely no indication that the Act intended to deal with the regulation of otherwise exempt commodities when transported in mixed loads with non-exempt commodities.

The conclusion we reach, then, is that Newton may continue the transportation of frozen fruits, berries, and vegetables in straight loads to the extent the Commission authorized such transportation under the "general commodities" and "frozen foods" descriptions in its certificates issued before 1958. Other rights claimed by Newton must find their support, if at all, not under the "agricultural commodities" and "farm produce" clauses of its certificates, but under the "grandfather" or extension provisions.

Newton's second argument is that the Commission unduly restricted its grant of authority under the "grandfather" provision, § 7(c) of the Transportation Act of 1958, as a result of an inappropriate statistical analysis of the carrier's past shipments and a disregard of the territorial nature of its service and the transportation characteristics of the frozen foods involved.

The governing legal principles are clear. In Alton R. Co. v. United States, 315 U. S. 15 (1942), the Supreme Court stated the basic propositions which have often been reaffirmed:

> "'Territory' is not a word of art. The characterization of the transportation service involved as well as the geographical area permitted are relevant to the territorial scope of the operations which may be authorized under the 'grandfather' clause. While the test

[illegible] 'bona fide operation' within a specified territory [illegible] rather than potential or [illegible] service (McDonald v. Thompson, 305 U.S. 263, 266) [illegible] does not necessarily restrict future operations to the precise points or areas already served. The characteristics of the transportation service rendered may of necessity have made trips to any specified locality irregular or sporadic. And they may likewise have restricted prior operations to but a few points in a wide area which the carrier held itself out as being willing and able to serve." (315 U. S. 15, 20-21).

In addition to repeating these principles, United States v. Carolina Freight Carriers Corp., 315 U. S. 475 (1942), stated:

"The Act provides the test of 'bona fide operation'. That standard carries the connotation of substantiality. It does make clear that a holding out to serve a specified area is not alone sufficient. . . . Substantial, as distinguished from incidental, sporadic, or infrequent, service is required. . . . In addition, the Commission, in determining the precise territory which may be served by a particular carrier, cannot [illegible] abrogation of its responsibility to coordinate the various transportation agencies which constitute our national transportation system. . . .

[illegible] of the 'grandfather clause' was to assure those to whom Congress had extended its benefits a substantial parity between future operations and prior bona fide operations." (315 U.S.

[illegible] a three per curiam opinion (three justices [illegible] the Supreme Court in Willis Shaw Frozen Ex- [illegible] made [illegible] [illegible] [illegible]

"We think United States v. Carolina Freight Corp., 315 U. S. 475, requires reversal of the [illegible] judgment and a remand to the Commission for reconsideration in light of appellants' claims that [illegible] furnishes as a common carrier the service [illegible] characteristics and marketing patterns of [illegible] seasonal agricultural products, and the [illegible] ability of appellants to perform the service." 329 U. S. 163, 169-170.

In its final report in the case under consideration here, the Commission indicated its awareness of these principles when it cited the *Carolina Freight* case and stated that "the characteristics of the transportation service rendered are relevant to the territorial scope of the operations to be authorized." 59 M. C. C. 702, 706. Our subsequent specific review of the Commission's conclusions will also consider Newton's evidence of the factors listed in the *Willis Shaw* case.

While the relevant legal principles are thus quite apparent, there is considerable difficulty in applying them to peculiar facts and circumstances in each case. Several recent cases have arisen in which the courts have found error in the Commission's treatment of the "grandfather" question. These cases provide a convenient starting place for analysis of the Commission's action in the present case.

Many of the cases have involved the issue of what period of operations is relevant to the statutory date of May 1, 1935. For example, in Florida Motor Express v. United States, 319 U. S. 124, 63 S. Ct. [illegible], the Commission had refused to consider shipments [illegible] prior to January 1, 1935 as being too remote. The court held that there was error in the [illegible] date.

[illegible] should have been given an opportunity to show the nature and extent of its operations [illegible]

[illegible] prior to 1957 to prevent any distortion of the true pattern of its activities due to a variance in seasons and in the other factors that affect cases of the kind here involved." (219 F. Supp. [illegible]).

See also Winter Garden Co. v. United States, 211 F. Supp. [illegible] (D. C. Texas, 1962); Hale Distributing Co. v. United States, 221 F. Supp. 266 (D. C. Calif. 1963). In the case presently under consideration, although Division 1 stated that certain shipments transported by Newton in 1956 were "too remote from the statutory date of May 1, 1958, to establish bona fide operations thereon, and will not be considered by us" (34 M. C. C. 759, 774), the full Commission on reconsideration included these 1956 shipments in its analysis (95 M. C. C. 702, 704, 707-708). Our review likewise will include consideration of Newton's evidence of shipments in 1956.

Another issue raised in the cases is whether frozen fruits, berries, and vegetables should be considered as a single commodity class for purposes of analyzing bona fide operations under the "grandfather" clause. For instance, in Winter Garden Co. v. United States, 211 F. Supp. 250 (D. C. Texas, 1962), the Court held that in certain instances the Commission committed error by restricting authority to frozen berries to the exclusion of frozen vegetables. See also Frozen Food Express v. United States, [illegible] F. Supp. [illegible] (D. C. Texas 1966); Willis Shaw Frozen Express, Inc. v. United States, 256 F. Supp. 257 (D. [illegible] 1966). In the case presently under consideration, although Division 1, in its findings treated the [illegible] as separate classes (34 M. C. C. 759, [illegible] full Commission on reconsideration stated that [illegible] that these commodities constituted an [illegible] the view that the three [illegible] commodities [illegible] applicant as a single class, [illegible] be considered [illegible] (95 M. C. C. 702,

707). Accordingly, in our review we also will treat the Commodities as being in a single class.

We turn now to a specific consideration of the "grandfather" authority which the Commission granted on the basis of the evidence submitted by Newton. In particular, we must review the evidence upon which the Commission determined the extent of Newton's actual bona fide operation as contrasted with mere holding out. In undertaking this task we are not unmindful that "the precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission", United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 480 (1942), and that "the judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed." Ibid., at 482. In fact, the United States Supreme Court in a case involving review of a Commission action in another area has very recently reversed a judgment of a three-judge District Court on the ground that:

> "As we said in *Consolo* v. *Federal Maritime Comm'n*, 383 U. S. 607, 620 (1966), 'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence'. It is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings in the case. Its duty is to determine whether the evidence supporting the Commission's findings is substantial. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474 [1951]." Illinois Central Rr. Co. v. Norfolk & Western Ry. Co., ——— U. S. ———, (November 14, 1966).

It appears from the evidence before the Commission that Newton [illegible] irregular route motor common carrier operating [illegible] and trailers, 15 of which are refrigerated. From a base [illegible] in Bridgeville, Delaware. Two shippers appeared before the Commission in support of

Newton's Application. One, John H. Dulany & Son, Inc., ships the frozen foods involved from its own processing plants at Bridgeville, Delaware and Exmore, Virginia and from co-packers elsewhere to warehouses and distributors in the territory under consideration. The other, Libby, McNeill & Libby, ships frozen foods from its processing plant at Houston, Delaware and warehouses elsewhere to customers and other warehouses.

Newton submitted into evidence a record of some 225 separate trips it made during the years 1956, 1957, 1958, and 1959. This record included all of the shipments of the involved commodities handled by Newton from January 14, 1957 through November 19, 1959, except those originating from Exmore, Virginia and Bridgeville, Dover and Houston, Delaware; seven shipments in 1956 also claimed by another trucker; and shipments hauled by Newton from Exmore, Bridgeville, Dover and Houston during the month of August of the years 1957, 1958, and 1959.[3] While we recognize that Newton during these years may have engaged in transportation which is not of record, we are limited to these 225 or so trips to the extent Newton's actual performance is relevant in our review of the Commission's action. Newton itself has made the decision to base its "grandfather" application on these 225 or so trips and we cannot speculate on the impression which might have been conveyed by a record which contained a different number, or indeed all, of the trips Newton performed during this or any other period of time. Of course, as we have said, we also [illegible] the actual trips to other factors which might indicate that the particular lanes are representative of a [illegible] service.

It will be useful to break our analysis down into three [illegible] corresponding to the three areas of operation New-

[illegible] in Appendix B to the original [illegible]

ton desires to have authorized.[5] At each stage we shall compare the authority Newton sought with the authority the Commission granted and analyze the evidence of shipments not only actually made but also authorized to be made under Newton's "general commodities" and "frozen foods" clauses.[6] For we agree with the Commission below that:

> "To exclude from consideration shipments which might have been transported under authority then held by applicant would create a fragmented and distorted view of the totality of applicant's operation and constitute a serious impediment to the achievement of substantial parity between applicant's past and future service. Indeed, such a conclusion would, in effect, penalize applicant for holding certificates authorizing broad 'general commodity' and 'frozen food' authority." (98 M. C. C. 702, 706).

Newton first requested authority to transport the frozen foods involved throughout the Middle Atlantic area of New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and the District of Columbia. The Com-

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[5] There are as follows:

(1) Between all points in New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and the District of Columbia.

(2) Between the points described in (1) above, on the one hand, and, on the other, all points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, North Carolina, South Carolina, Georgia, and Florida.

(3) Between all points in Maine, Massachusetts, and Connecticut, on the one hand, and, on the other, all points in North Carolina, South Carolina, Georgia, and Florida.

[6] These authorities are summarized in the Appendix to 98 M. C. C. 702, 711, except for the following authority which the Commission apparently overlooked: General commodities, from Baltimore, Md., and Long Island City, N. Y., and from points in New Jersey, to points in Sussex and Kent Counties, Del., and those in Caroline, Dorchester, Queen Annes, Somerset, Talbot, Wicomico, and Worcester Counties, Md.

mission granted Newton an area-wide authority between all points within a central core comprised of Maryland, Delaware, that part of Virginia on the Delmarva Peninsula, and Washington, D. C. The Commission made this grant on the basis of Newton's evidence of some 85 shipments between points within this area, and on the basis of the "general commodities" and "frozen foods" authority set out in the margin.[9]

The Commission also granted Newton authority from all points in New York to all points within the central core area. The Commission made this grant on the basis of Newton's evidence of 8 shipments from points in New York to points within the central core, and on the basis of the "general commodities" and "frozen foods" authority set out in the margin.[10] In addition, the Commission granted Newton authority in the opposite direction from all points within the central core area to all points in New York. The Commission made this grant on the basis of Newton's evidence of 39 shipments from points within the central core to points in New York, and on the basis

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[9] General commodities, with exceptions, between Princess Anne, Md., and points within 15 miles thereof, not including Salisbury, Md., on the one hand, and, on the other, Wilmington, Del. and Baltimore, Md. General commodities, with exceptions, from Baltimore, Md. to points in Sussex and Kent Counties, Del., and those in Caroline, Dorchester, Queen Annes, Somerset, Talbot, Wicomico, and Worcester Counties, Md. Frozen foods, from Exmore, Va., and Bridgeville and Dover, Del., to points in Delaware, Maryland and the District of Columbia. Frozen foods between Exmore, Va., Bridgeville and Dover, Del. Frozen foods from Houston, Del., to Dover, Delaware.

[10] General commodities, with exceptions, between Princess Anne, Md., and points within 15 miles thereof, not including Salisbury, Md., on the one hand, and, on the other, New York, N. Y.,

General commodities, with exceptions, from Long Island City, N. Y., to points in Sussex and Kent Counties, Del., and those in Caroline, Dorchester, Queen Annes, Somerset, Talbot, Wicomico, and Worcester Counties, Md.

Frozen foods, from Brockport, N. Y., to Exmore, Va., and Bridgeville, Del.

of the "general commodities" and "frozen foods" authority set out in the margin.[11]

The Commission also granted Newton authority from all points within the central core area to all points in Pennsylvania. This grant was made on the basis of Newton's evidence of 21 shipments from points within the central core to points in Pennsylvania, and on the basis of the "general commodities" and "frozen foods" authority set out in the margin.[12] In addition, the Commission granted Newton authority in the opposite direction from all points in Pennsylvania to Exmore, Va. This grant was made on the basis of Newton's evidence of 12 shipments from points in Pennsylvania to Exmore, Va.

Finally, the Commission granted Newton authority from all points within the central core area to Kearney and Jersey City, N. J. The Commission made this grant on the basis of 5 shipments from points within the central core to Kearney and Jersey City, N. J., and on the basis of the "general commodities" and "frozen foods" authority set out in the margin.[13]

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[11] General commodities, with exceptions, between Princess Anne, Md., and points within 15 miles thereof, not including Salisbury, Md., on the one hand, and, on the other, New York, New York.

Frozen foods from Exmore, Va., and Bridgeville and Dover, Del. to points in New York.

[12] General commodities, with exceptions, between Princess Anne, Md., and points within 15 miles thereof, not including Salisbury, Md., on the one hand, and, on the other, Chester, Marcus Hook, and Phila., Pa.

Frozen foods, from Exmore, Va., and Bridgeville and Dover, Del., to points in Pennsylvania.

[13] General commodities, with exceptions, between Princess Anne, Md., and points within 15 miles thereof, not including Salisbury, Md., on the one hand, and, on the other, Jersey City, N. J.

Frozen foods, from Exmore, Va., and Bridgeville and Dover, Del., to points in New Jersey.

It appears from the foregoing analysis that, while the Commission granted rather extensive authority within the Middle Atlantic area, it failed to grant the full authority Newton desires. There was some evidence which might have been a basis for further grants of authority. A statewide authority to New Jersey from the central core might have been based on Newton's evidence of a single shipment from Exmore, Va. to Spring Lake, N. J., and on the "general commodities" and "frozen foods" authority set out in the margin.[14] However, we believe that the Commission's decision was adequately supported by its judgment that "a single shipment to Spring Lake, N. J., in 1959 appears to have been an isolated one which does not, in our opinion, warrant additional rights". (98 M. C. C. 708, 708). Nor can Newton be greatly hurt by this conclusion because it possesses "frozen foods" authority from Exmore, Va., and Bridgeville and Dover, Delaware to all points in New Jersey and "grandfather" authority between all points in the central core, authorities which together allow it to go from all points in the central core to all points in New Jersey by following some times circuitous routes through Exmore, Va., or Bridgeville or Dover, Del."[15] "Again, there was some evidence which might have been a basis for a further grant of authority from all points in New Jersey back to the central core area, namely, the "general commodities" and "frozen foods" authority set out in the margin."[16] However, as Newton

[14] General commodities, with exceptions, between Princess Anne, Md., and points within 15 miles thereof, not including Salisbury, Md., on the one hand, and, on the other, Newark, N. J.

[15] [illegible] from Exmore, Va., and Bridgeville and Dover, Del. to points in New Jersey.

[16] [illegible] 98 M. C. C. 708, 709: "Pursuant to certificates now in force and the 'grandfather' rights authorized herein, applicant may now perform all or some part of the service presented in the published [illegible] directly or by tacking of the rights held."

[17] Also Wilmington.

[14] General commodities, with exceptions, between Princess Anne, Md., and points within 15 miles thereof, not including Salisbury,

submitted no evidence of transportation from New Jersey to the central core we cannot say that the Commission's judgment not to grant such authority was unwarranted.

Newton also submitted evidence of one trip from Somerbrook, N. J. to Norfolk and Roanoke, Virginia which might have been the basis for additional grandfather rights. But we cannot substitute our judgment for the Commission's conclusion that "a split load from Somerbrook, N. J., to Norfolk and Roanoke, Va., in 1957 . . ." [is] not demonstrative of continuous operations justifying a 'grandfather' grant". (98 M. C. C. 702, 707). Newton also submitted evidence of a shipment from Salisbury, Md. to Norfolk Va. which, together with the "frozen foods" authority set out in the margin,[14] might have been the basis of a grant of "grandfather" authority from the central core area to Virginia. But again our limited powers of judicial review do not allow us to upset the Commission's judgment.

There was certain "general commodities" authority which might have been the basis of a grant from Pennsylvania to the base area.[15] But as these Pennsylvania points are all concentrated along the Delaware River near Delaware the Commission was justified in not basing a

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Md., on the one hand, and, on the other, Newark and Jersey City, N. J.

General commodities, with exceptions, from points in New Jersey to points in Sussex and Kent Counties, Del., and those in Caroline, Dorchester, Queen Annes, Somerset, Talbot, Wicomico, and Worcester Counties, Md.

Frozen foods between Exmore, Va., Vineland, N. J., Bridgeville and Dover, Del.

[14] Frozen foods, from Exmore, Va. and Bridgeville and Dover, Del. to points in Virginia.

[15] General commodities, with exceptions, between Princess Anne, Md., and points within 15 miles thereof, not including Salisbury, Md., on the one hand, and, on the other, Chester, Marcus Hook, and Philadelphia, Pa.

grant of statewide authority from Pennsylvania upon [illegible].

Finally, Newton's evidence of a single shipment from Richmond to Exmore, Va. in 1959 is not sufficient for any additional grant of "grandfather" authority.

This detailed examination of the evidence of shipments within the Middle Atlantic area reveals that the Commission was rather generous in its grants of "grandfather" authority to Newton. The Commission adopted an origin territory approach rather than an origin points approach. Compare Jarman v. United States, 219 F. Supp. 108 (D. C. Md. 1963). The Commission did not fail to consider the other relevant factors detailed in the *Willis Shaw* decision.[14] With few exceptions, the Commission did in fact base grants of "grandfather" authority upon all the actual shipments Newton introduced into evidence. Even when considered together with Newton's alleged holding out,[15] these exceptions which involved only a few isolated shipments are not sufficient to justify interference with the Commission's denial of further grants of "grandfather" authority here.

Newton secondly requested authority to transport the frozen foods involved between the Middle Atlantic area and the New England states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut,

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[14] The Commission stated: "In determining the characteristics of the service which applicant has performed in the transportation of the 'grandfather' commodities here involved, it is significant, we believe, that applicant's operations have been performed principally for the two shippers which appeared in support of the application in the subdivided proceeding. A large portion of the traffic has moved between production and processing points and from such points to storage facilities at various points throughout the considered territories." (99 M. C. C. 702, 706)

[15] It is to be observed that Newton was not denied the opportunity of submitting evidence of solicitation. Compare Frozen Food Express v. United States, 219 F. Supp. 131 (D. C. Texas 1963)

and between the Middle Atlantic states and the Southeastern area of North Carolina, South Carolina, Georgia, and Florida. The Commission granted Newton authority from the central core area of the Delmarva Peninsula, Maryland, and the District of Columbia to Hartford and Wallingford, Connecticut, and Lewiston, Maine. The Commission made this grant on the basis of Newton's evidence of some ten shipments from the central core to these New England points, and on the basis of the "frozen foods" authority set out in the margin.[21] The Commission also granted Newton authority from Caribou, Maine, to New York, N. Y., and Carnegie, Pennsylvania. The Commission made this grant on the basis also of some ten shipments from Caribou to New York and Carnegie.

It appears that with respect to transportation between the Middle Atlantic states and New England and the south the Commission greatly restricted its grant of "grandfather" authority compared to Newton's request. Therefore, it is important to analyze Newton's evidence which was deemed insufficient as a basis for the grant of further "grandfather" authority. First, there was evidence of seven shipments in the latter part of 1958 and in 1959 from Caribou, Maine to Exmore, Virginia. As none of these shipments was made before the statutory date, they did not necessarily require the Commission to grant additional "grandfather" authority. Besides, since Newton will be authorized to make such shipments in the future by combining the "grandfather" authorities from Caribou to New York and from all points in New York to the central core area,[22] the carrier cannot be greatly disturbed by this conclusion. A single shipment from Caribou, Maine to Philadelphia, Pennsylvania in 1959

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[21] Frozen foods, from Exmore, Va., and Bridgeville and Dover, Del. to points in Connecticut.

Frozen foods, from Dover, Del., to points in Maine.

[22] See Footnote 15.

could rightfully have been rejected by the Commission as a basis for additional "grandfather" authority. We thus find no acceptable basis for overruling the Commission's conclusion that "no authority is warranted from Maine origins in addition to that granted * * *". (98 M. C. C. 702, 707).

Newton also submitted evidence of three shipments from Watertown, Mass. and Hartford, Conn. to Philadelphia, Pa. and Houston, Delaware. Again, we must respect the Commission's judgment in denying further "grandfather" authority on the basis of this evidence: "The only shipments shown to have been moved by applicant from Connecticut and Massachusetts were one to Houston, Del., and two to Philadelphia, Pa., from Hartford, Conn., and Watertown, Mass., (split pickups), both after the critical date. These movements are insufficient to show operations on the critical date from this territory". (98 M. C. C. 702, 707).

Outbound from the Middle Atlantic states to New England, Newton produced evidence of one shipment from Landover, Md. and one from Pittsburgh, Pa. to Watertown, Mass., one shipment from Houston, Del. to Springfield, Mass., one from Exmore, Va. to Warren, R. I., and two split loads from Seabrook, N. J. to Bangor and Pinepoint, Maine. Newton also has the "frozen foods" authority outbound to New England which is set forth in the margin.* The Commission concluded that "two split loads to Bangor and Pinepoint, Maine, in 1956 are not demonstrative of continuous operations justifying a 'grandfather' grant." (98 M. C. C. 702, 707) and that "shipments to Watertown and Springfield, Mass., after the

* [illegible] Delaware, Maryland, and the District of Columbia, those from Boston, Mass. and Bridgeville and Dover, Del. to Boston and Cambridge, Mass. and points in Connecticut, Rhode Island, Delaware to points in Rhode Island, Connecticut, New Hampshire, Maine, and those in Massachusetts on and within 25 miles of Boston.

critical date, and to Warren, R. I. before the critical date, are insufficient to meet the statutory requirement of continuous service on and since the critical date. (98 M. C. C. 702, 706). The foregoing evidence of these shipments justifies the Commission's conclusion, in addition, since Newton may combine its "grandfather" authority within the central area and its "frozen foods" authority to New England points [illegible], we do not think that the Commission's denial of further "grandfather" authority here should be upset by us.

The only evidence Newton introduced to support its application between the Southeastern states and the Middle Atlantic states consisted of split loads from Tampa, Florida to New York and Jersey City and from Plant City, Fla., to Charlotte, N. C., and Philadelphia and Altoona, Pennsylvania before the critical date, plus the "frozen foods" authority set out in the margin.* Considering the totality of the record, we cannot disagree that such evidence is "not indicative of continuous operations from that territory for which 'grandfather' rights should be granted." (98 M. C. C. 702, 707).

Therefore, as to the second part of Newton's application concerning transportation between the Middle Atlantic states, on the one hand, and New England and the Southeast, on the other, we find sufficient basis not to overturn the Commission's action as being unduly limited. We recognize that Newton may have solicited business between these area and that Newton, if it does not have authority to haul other products inbound, may be left primarily with an uneconomic one-way outbound service to New England. The decision which the Commission has made in the matter is, however, well within the bounds of its discretion. See Colonial Refrigerated Transporta-

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* See Footnote 15.

** Frozen foods, from Baltimore, Md., and Bridgeville and Dover, Del. to points in North Carolina.

Gen. Inc. v. United States, 255 F. Supp. 999, 1003 (D. C. Ala. 1966):

> "We cannot say that, in weighing the specific evidence contained therein against the backdrop of the complexities of this transportation service, a process requiring the exercise of expert, empirical judgment, the Commission transgressed in imposing such geographical restrictions."

Finally, Newton requests authority to transport the frozen foods involved between the New England states of Maine, Massachusetts, and Connecticut and the Southeastern states of North Carolina, South Carolina, Georgia, and Florida. As Newton submitted no evidence whatsoever of shipments between these states, nor sufficient evidence of other pertinent factors, the Commission correctly denied any grant of "grandfather" authority for such transportation.

Our ultimate conclusion, then, is that the Commission's grant of "grandfather" authority to Newton may not be disturbed. We now consider whether additional rights should have been conferred in the extension proceedings.

Newton asserts in its third argument that the Commission erred in denying in its entirety the "extension" application under 49 U. S. C. A. § 307(a). For a motor carrier to be granted relief under this section, it must bear the burden of demonstrating that the present or future public convenience and necessity will be served by the services sought. Newton has failed to meet this burden.

A basic ingredient in the determination of public convenience and necessity is whether the existing facilities are adequate to meet the present or future transportation requirements. *Curtis, Inc. v. United States*, 225 F. Supp. 304 (D. C. Colo. 1964), *aff'd. mem.*, 378 U. S. 122 (1964). On this issue the Commission found (98 M. C. C. [illegible] Cambridge,

"[A]pplicant has failed to demonstrate with reasonable degree of specificity that the service afforded by existing carriers is inadequate. . . . existing regular—and irregular— . . . carriers provide direct service for the . . . frozen foods at virtually all points in the Atlantic States and offer interline . . . movements between . . . and shippers obtain . . . services to the extent authorized . . . ."

The record amply supports the accuracy of the Commission's finding that there exists direct service and interline arrangements throughout the areas involved. Nevertheless, Newton attacks the Commission's finding as to the adequacy of that service. It asserts that the service of "existing carriers" which the Commission found to be adequate included Newton's own service and for this reason the finding is unsupported under Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646, 653 (D.C. N.H. 1964). However, evidence before the Commission, which included the protestants' operating authorities[*] and testimony as to the satisfactory nature of the services of motor carriers other than Newton, fully justified its conclusion that the existing service was adequate and satisfactory.

Nevertheless, Newton points out that when the shippers expressed their satisfaction with the existing service, exclusive of Newton's, they were careful to limit their approval to the services performed within the scope of the carriers' authorities. Transportation beyond the reach of the authority of a given motor carrier necessitated resort to joint-line transportation, i.e., the use of two or more inter-connecting carriers. Since the shippers . . . unanimously expressed a preference for . . . than joint-line service for the transportation of frozen

[*] See Appendix C, pp. M. C. C. . . . "

Texas Newton contends that the service offered by the other carriers was not satisfactory to the shippers, and that the finding of the Commission to the contrary is not supported by the evidence. The answer to this argument is found in the Commission's report (98 M. C. C. 702, 708):

"A mere preference for single-line service, of course, is not sufficient to show inadequacy of joint-line service, in the absence of demonstrated service deficiencies."

This conclusion is based upon judicial precedent from which there appears to be no dissent. Ayer v. United States, 189 F. Supp. 440, 443-4 (D. C. Ga. 1956); Colorado-Arizona-California Express, Inc. v. United States, 224 F. Supp. 956, 960 (D. C. Colo. 1963); Curtis, Inc. v. United States, supra, at 900.

Although the Commission recognized that evidence of past services is a factor to be considered in determining whether a public need exists for the authority sought, Newton asserts that the Commission erroneously failed to consider its past services and the findings of the First Commission Report in that regard. This criticism is unfounded. The Third Report, in considering Newton's "grandfather" application, carefully analyzed the prior services which Newton performed. Upon the basis of that analysis, the Commission partially granted Newton's "grandfather" application, not only with respect to certain points or point operations, but extensively as to a number of state-wide operating rights. In this latter respect, the Third Report contrasts sharply with the First Report which denied Newton any state-wide rights under the "grandfather" application. The Commission, in discussing the "grandfather" application, said in its Third Report [illegible]:

"There are very few points or territories at which any service has been shown to have been provided

by applicant which are not covered by our grant of authority in [the grandfather] proceeding." [11] The Commission concluded that this evidence of past operations by Newton did not warrant granting to Newton any "extension" rights. In view of the differences between the First and Third Report in the evaluation of the evidence as it related to Newton's "grandfather" rights, it would have been pointless for the Third Report to have referred to the findings in the First Report as to Newton's past services.

Finally, Newton contends that as in *Nashua* the Commission incorrectly limited its consideration of public convenience and necessity to a determination of the adequacy of existing service. It is clear, however, that the Commission did not so limit itself, but concluded only that "any claim of public need for the proposed service based on an asserted lack of satisfactory service must fail." (98 M. C. C. 702, 709). Congress intended to leave to the Commission administrative discretion to decide whether additional motor service would serve public convenience and necessity. Interstate Commerce Commission v. Parker, 326 U. S. 60, 65 (1945). Our conclusion, then, is that the Commission's denial of Newton's request for "extension" authority was a sound exercise of its administrative discretion.

As we find no cause for remand of these proceedings to the Commission, upon submission an appropriate order will be entered dissolving the temporary stay of the Commission's order and dismissing the action.

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[11] The accuracy of this finding is justified by the record. There were only about fifteen shipments by Newton which were not the basis of "grandfather" grants. Almost without exception, there was only one shipment between any two points.

BYRNE, *District Judge*, (Concurring Opinion):

I, like the majority, find it unnecessary to resolve the issue whether Newton's "agricultural commodities" and "farm produce" certificates should be interpreted as the Commission asserts was intended at the time of their issuance or should be accorded the meaning attributed to "agricultural commodities" in section 203(b)(6) of the Interstate Commerce Act by the Supreme Court in *Home Transfer & Storage Co. v. United States*, 141 F. Supp. 599 (D. C. Wash. 1956), *aff'd, per cur.*, 352 U. S. 884 (1956). I, therefore, refrain from expressing any view on this question, even by way of *dictum*, as has the majority of the Court. Otherwise, I concur in its opinion.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 328

LESTER C. NEWTON TRUCKING COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (264 F. Supp. 869; J.S. App. 72), dismissing appellant's action to set aside an order of the Interstate Commerce Commission (J.S. App. 14, 57) in its Docket No. MC-113388 (Sub-No.

26), *Lester C. Newton Trucking Co. Common Carrier "Grandfather" Application.*[1]

By application filed December 8, 1958, appellant sought "grandfather" authority under Section 7(c) of the Transportation Act of 1958 (72 Stat. 573, 49 U.S.C. following 303(b)(6)) to transport frozen fruits, berries, and vegetables between various points in an area comprising sixteen eastern States and the District of Columbia. The following year, on November 17, 1959, appellant applied for an extension of its certificate of public convenience and necessity under Section 207(a) of the Interstate Commerce Act (49 U.S.C. 307(a)) to transport the identical commodities between the same points. The applications were heard upon a consolidated record (J.S. App. 3). At the hearing appellant sought a determination that these three commodities were included in the terms of its existing certificates which authorize the transportation of "general commodities," "frozen foods," "agricultural commodities," and "farm produce." After full administrative hearings, the Commission (a) found that appellant was entitled to "grandfather" authority from and to specified points in seven States and the District of Columbia (J.S. App. 32–33); (b) denied appel-

[1] The Commission's report on reconsideration, decided May 19, 1965, also included No. MC–113388 (Sub-No. 27), *Lester C. Newton Trucking Co. Extension—Frozen Fruits, Vegetables, and Berries*, and is officially reported at 98 M.C.C. 702. The original decision of the Commission, dated April 28, 1961, granting the carrier limited authority under its "grandfather" and extended applications, is reported at 84 M.C.C. 758. The subsequent denial by the Commission on reconsideration of the entire extension application, dated May 10, 1962, is reported at 89 M.C.C. 262.

lant's application for a certificate of public convenience and necessity (J.S. App. 51); and (c) found that the terms "agricultural commodities" and "farm produce," as used in appellant's existing certificates, did not authorize the transportation of the frozen fruits, berries, and vegetables (J.S. App. 27–28).

Appellant challenged these orders in the United States District Court for the District of Delaware, which temporarily enjoined them (J.S. App. 60). However, as a result of this Court's decision in *Willis Shaw Frozen Express, Inc.* v. *United States*, 377 U.S. 159, the Commission, on its own motion, reopened the proceeding for reconsideration on the existing record, and the district court stayed its proceeding (J.S. App. 60). In its subsequent report on reconsideration, the Commission concluded that, applying the standards established in *Willis Shaw*, appellant was in fact entitled to broader "grandfather" authority than had previously been awarded, and therefore expanded this authority to include service between additional points (J.S. App. 68–69). The Commission affirmed its prior findings as to the other issues (J.S. App. 57–71). Appellant then pursued its action in the district court. A three-judge district court (convened under 28 U.S.C. 2284, 2325), one judge concurring in a separate opinion, sustained the Commission's order and dismissed appellant's complaint (J.S. App. 99–100).

ARGUMENT

This appeal presents no substantial questions warranting plenary consideration by this Court. The legal standards for grants of motor carrier certificates,

whether under a "grandfather" clause or upon proof of public convenience and necessity, as well as their subsequent interpretation, are well settled. There was substantial evidence to support the Commission's application of those standards in the instant case.

1. Determination of the operations which a motor carrier may conduct under a "grandfather" clause, such as that of Section 7(c) of the Transportation Act of 1958, is a function reserved to the Commission. *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 489–490. In its report on reconsideration (J.S. App. 62 *et seq.*), the Commission applied the standards which this Court in *Willis Shaw Frozen Express, Inc.* v. *United States*, 377 U.S. 159, held to obtain in determining "grandfather" rights to transport frozen fruits, frozen berries and frozen vegetables under the 1958 legislation.[1]

Here the record reveals that the Commission's grant of "grandfather" authority achieved substantial parity with appellant's prior *bona fide* operations. That grant was plainly in compliance with Section 7(c) (see J.S. App. 82–83). In fact, as the court below observed (J.S. App. 92), the Commission, in considering the factors set out in this Court's *Willis Shaw* decision, was

[1] Only last term, this Court summarily affirmed three similar decisions involving the application of Section 7(c) to specific situations. In *Battaglia* v. *United States*, 385 U.S. 115, the Commission had denied in part the motor carrier's application for "grandfather" rights, while in *Ewley Express, Inc.* v. *United States*, 385 U.S. 371, and *Colonial Refrigerated Transportation, Inc.* v. *United States*, 385 U.S. 480, as in this case, the Commission had substantially granted the application.

"rather generous in its grants". That the Commission attached greater weight to certain evidence before it than it did to other evidence does not support appellant's charge that it "ignored all evidence except that of actual past points served" (J.S. 17). In any event, the weighing of evidence before the Commission is not a matter of concern for the courts, so long as substantial evidence supports the result reached. *United States* v. *Carolina Carriers Corp., supra,* 315 U.S. at 489–90; *Alton R. Co.* v. *United States,* 315 U.S. 15, 23. The Commission's evaluation of the evidence supporting its grant (J.S. App. 48–50; 63–66), carefully reviewed by the lower court (J.S. App. 86 *et seq.*), need not again be canvassed by this Court.

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[1] In analyzing the Commission's rationale, the court below stated (J.S. App. 92):

> The Commission adopted an origin territory approach [with respect to shipments within the Middle Atlantic area] rather than an origin points approach. * * * The Commission did not fail to consider the other relevant factors detailed in the *Willis Shaw* decision. With few exceptions, the Commission did in fact base grants of "grandfather" authority upon all the actual shipments Newton introduced into evidence. Even when considered together with Newton's alleged holding out, these exceptions which involved only a few isolated shipments are not sufficient to justify interference with the Commission's denial of further grants of "grandfather" authority here.

Moreover, the court found that with respect to shipments between the Middle Atlantic States, on the one hand, and New England and the Southeast, on the other, the evidence of shipments was either fragmentary, or, in some cases, non-existent, and that, consequently, "the Commission correctly denied any grant of 'grandfather' authority for such transportation" (J.S. App. 94–96).

2. The Commission's denial of appellant's application for extension of its certificates under Section 207 (a) of the Interstate Commerce Act was premised on appellant's failure to establish that the public convenience and necessity required its operations beyond those certificated in the companion "grandfather" proceeding. As the lower court correctly stated (J.S. App. 96), "[a] basic ingredient in the determination of public convenience and necessity is whether the existing facilities are adequate to meet the present or future transportation requirements." See *Curtis, Inc.* v. *United States*, 225 F. Supp. 894, 898 (D. Colo.), affirmed, 378 U.S. 128; *Quickie Transport Co.* v. *United States*, 169 F. Supp. 826, 829 (D. Minn.), affirmed, 361 U.S. 36; *Hudson Transit Lines, Inc.* v. *United States*, 82 F. Supp. 153 (S.D. N.Y.), affirmed, 336 U.S. 802. Here appellant failed to carry its admitted burden of showing that the existing service was inadequate (J.S. App. 96–97).

Contrary to appellant's assertion (J.S. 17–18), the Commission treated appellant's past operations performed under color of right as a factor to be taken into account in determining the public convenience and necessity (J.S. App. 67–68). Such evidence is of course not dispositive, particularly since the record showed an abundance of satisfactory motor carrier service by existing operators. *Zuesch Truck Line, Inc., Investigation of Permit*, 83 M.C.C. 625, 636–637, sustained *sub nom. Zuesch Truck Line* v. *United States*, 224 F. Supp. 457 (D. Kan.); *Floyd & Beasley Transfer Co., Inc., Extension—Mill Supplies*, 79 M.C.C. 269, 274, sustained *sub nom. Floyd & Beasley Transfer Co.* v. *United States*, 185 F. Supp. 390 (N.D. Ala.). The

Commission is required to exercise informed administrative discretion, considering the wide variety of circumstances which may be involved in specific situations, in determining whether a new certificate should issue. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241. That discretion was not improperly exercised here.

3. In regard to the scope of operations that appellant may perform under its outstanding certificates, this Court has held that interpretation of motor carrier certificates is properly left to the Commission (*Service Transfer Co.* v. *Virginia*, 359 U.S. 171, 178), and that its construction will not be overturned unless clearly erroneous, arbitrary or capricious. *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554; *Noble* v. *United States*, 319 U.S. 88, 93; *National Trailer Convoy, Inc.* v. *United States*, 240 F. Supp. 286, 288 (N.D. Okla.), affirmed, 382 U.S. 40; *W. J. Dillner Transfer Co.* v. *Interstate Commerce Commission*, 193 F. Supp. 823, 825–826 (W.D. Pa.), affirmed, 368 U.S. 6; *Union Cartage Co.* v. *United States*, 193 F. Supp. 645, 646–647 (D. Mass.), affirmed, 368 U.S. 143.

Appellant contends that its existing "agricultural commodities" certificates entitle it to transport frozen fruits, berries and vegetables.[4] It argues (J.S.

[4] Were appellant correct in this contention, its authority under these certificates would relate only to the transportation of frozen fruits, berries, and vegetables in mixed loads with non-exempt commodities, since agricultural commodities transported in straight loads are exempted from economic regulations under Section 203(b)(6), and were so prior to the 1958 legislation (see note 6, *infra*.)

9-11, 15-16) that in interpreting its existing certificates to bar such authority, both the Commission and the court below have narrowed its certificates in violation of Section 7(b) of the 1958 Act (72 Stat. 573), a savings clause which preserves pre-existing authority, and Section 212(a) of the Interstate Commerce Act (49 U.S.C. 312(a)), which provides that certificates remain in effect until suspended, changed or revoked after notice and hearing. But this contention disregards the fact, as found by the Commission (J.S. App. 27-28, 63), that it never intended[1] to authorize the transportation of the frozen products in question at the time the "agricultural commodities" certificates were issued. Indeed, in *Newton, Extension of Operations—Frozen Foods*, 43 M.C.C. 787 (1944), appellant was granted "frozen food" authority upon the basis of a finding that the transportation of the three involved commodities was not authorized by its existing "agricultural commodities" certificates. Having acquiesced in this interpretation and grant of authority, appellant cannot now contest that definitive declaration of what rights existed from the very beginning under those certificates. Nor can such an interpretation be equated with modification of existing authority unless the construction of the certificates is so unreasonable as to be clearly erroneous. *Andrew G. Nelson, Inc.* v.

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[1] Where a contrary intent is shown, the carrier would, pursuant to Section 7(b) of the 1958 Act, be authorized to continue to transport such commodities under its pre-existing authority. See *Chesapeake Motor Lines, Inc., Common Carrier "Grain, Feeds" Application*, 89 M.C.C. 237 (1962); see also note 9, *infra*.

United States, supra, 355 U.S. at 558–559, n. 4. That is simply not the case here.[8]

[8] Under Section 203(b)(6) of the original Motor Carrier Act (49 Stat. 544–545), non-manufactured agricultural commodities shipped in straight loads were exempt from regulation. When shipped in mixed loads with non-exempt products, a certificate was required. *Interstate Commerce Commission* v. *Dunn*, 166 F. 2d 116 (C.A. 5); *Interstate Commerce Commission* v. *Service Trucking Co., Inc.* 186 F. 2d 400 (C.A. 3). The Commission consistently held, however, from 1935 to 1956, that frozen fruits, berries, and vegetables were not within the agricultural commodities exception, because it applied only to non-manufactured items. To transport frozen fruits, berries, and vegetables, therefore, whether in straight or mixed loads, a carrier was required to have a certificate specifically listing these items. In 1956, however, two court decisions held that these commodities were within the Section 203(b)(6) exemption. *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599 (W.D. Wash.), affirmed, 352 U.S. 884; *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S.D. Tex.), affirmed, 355 U.S. 6. In Section 7 of the Transportation Act of 1958 (72 Stat. 573), Congress clarified its intention with respect to the meaning of the agricultural commodities exception. Section 7(a) amended Section 203(b)(6) by adopting a previous Commission listing of exempt and non-exempt commodities and by expressly excluding from the exemption frozen fruits, berries, and vegetables. Congress thus affirmed and upheld the Commission's long-standing interpretation. See H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 15–17. To avoid any doubt that might be raised as to the effect of the amendment with respect to existing certificates, Congress provided in Section 7(b) that any carrier authorized to transport commodities which were subjected to regulation by the amendment in Section 7(a) could continue to operate without making further application. In Section 7(c) Congress provided that truckers who had previously been carrying items which Section 7(a) made non-exempt were entitled to a grandfather certificate provided they were in *bona fide* operation on May 1, 1958. Since Section 7(a) simply confirmed the Commission's original interpretation of the agricultural commodities exception, the scope of the certificate rights preserved by the savings clause in Section 7(b) are defined and delineated by that interpretation. Nothing in the 1958 Act or its legislative history reflects an in-

In addition, as the court below observed, appellant is precluded by the language and legislative history of Section 7(b) of the 1958 Act from relying on that provision as supporting its authority to transport frozen fruits, berries, and vegetables in mixed loads with non-exempt products under its existing "agricultural commodities" certificates (J.S. App. 79-81).[1]

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tent by Congress to alter the Commission's long-standing view in this regard, or to permit carriers to claim greater rights.

[1] In sustaining the Commission's determination that appellant's "agricultural commodities" certificates do not presently permit it to transport frozen fruits, berries, and vegetables (J.S. App. 81), the court below adopted a rationale somewhat different from, though consistent with, that of the Commission. Pointing out "that the Transportation Act of 1958 was intended to 'overrule' the *Home Transfer* and *Frozen Food* cases which had exempted frozen fruits, berries, and vegetables when carried in straight loads," the district court noted that "[t]here is absolutely no indication that the Act intended to deal with the regulation of otherwise exempt commodities when transported in mixed loads with non-exempt commodities" (*ibid.*). Previously, the court had noted that, to the extent that appellant sought to rely on the "agricultural commodities" certificates to support its continuing to transport frozen fruits, berries, and vegetables in mixed loads with non-exempt commodities (see p. 4, *supra*), Section 7(b) was inapposite and saved nothing, since such service "had not been held to be exempt by the courts but was already regulated prior to the Transportation Act of 1958" (J.S. App. 80). Although the district court found it unnecessary to resolve the issue as to the coverage of appellant's "agricultural commodities" certificates immediately before the effective date of Section 7(b), it did not reject the Commission's approach (see p. 3 and n. 6, *supra*) as erroneous (J.S. App. 79). And, in any event, the district court simply reached the same conclusion as the Commission on another ground (*ibid.*). That [illegible] may be different is beside the point, for the result reached by the district court is plainly correct. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88, citing and distinguishing *Helvering* v. *Gowran*, 302 U.S. 238, 245.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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No. 328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

LESTER C. NEWTON TRUCKING COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Delaware

---

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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Pursuant to Rule 16, Paragraph 8, of the Revised Rules of this Court, Appellant respectfully submits its Brief in opposition to the Motion to Affirm filed in behalf of the United States of America and the Interstate Commerce Commission.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

This appeal presents fundamental questions concerning determination by the Interstate Commerce Commission

of a motor carrier's rights by virtue of preexisting authority, prior bona fide operations, and public need to continue to transport commodities fully made subject to economic regulation by the Transportation Act of 1958.

The cumulative effect of the Commission's determinations would curtail Appellant's future operations to a scope narrower than permitted by certificates of public convenience and necessity issued long before the 1958 Act, narrower than its prior bona fide operations, and narrower than required by the shippers and receivers of involved commodities who have long utilized Appellant's service.

The questions presented involve interpretation of the provisions of the Transportation Act of 1958 and provisions of the Interstate Commerce Act. The question of whether the 1958 Act narrowed the scope of Appellant's preexisting certificates is of import to all motor carriers holding certificates antedating that Act and has never been determined by this Court. The narrowed scope given Appellant's preexisting certificates was material to proper determination of Appellant's coextensive applications for "grandfather" authority under Section 7(c) of the 1958 Act and under the public convenience and necessity provisions of Section 207(a) of the Interstate Commerce Act. Thus, if the proper scope of Appellant's preexisting certificates is broader than found by the Commission and the lower court, these applications must be redetermined. The standards employed in determining these applications were otherwise inconsistent with proper standards adumbrated by this Court and by other courts.

A. The Commission found (J.S. App. 26-29, 63) and the lower court agreed on other grounds (J.S. App. 79-81) that some of Appellant's certificates antedating the 1958 Act but not those reading *"Agricultural commodities"* [1]

[1] Appellant's authority reading *"Farm produce,* except citrus fruits," was equated with and treated the same as Appellant's

now authorize the transportation of frozen fruits, vegetables and berries made subject to regulation by the 1958 Act. The Government concedes (G.M. p. 10, n. 7) that the Commission and the lower court differed in their rationale but argues that both reached the correct result and that the difference in rationale "is beside the point . . ." In fact, neither rationale is correct, the Commission's is based upon a finding of specific intent which is clearly erroneous, the lower court's emasculates an entire section of the 1958 Act.

As the Government contends (G.M. 8) the Commission's construction turned upon a finding of specific intent at the time of issuance of Appellant's *Agricultural commodities* certificates not to include frozen fruits, vegetables, and berries. However, this finding of intent is the sheerest tautology; the Commission's only intent at the time of issuance of Appellant's *Agricultural commodities* certificates was to include the same commodities embraced within the unmanufactured agricultural commodities exemption of Section 203(b)(6) of the Interstate Commerce Act. (J.S. 19-20).[3] Since the scope of

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Agricultural commodities certificates (J.S. App. 27-28, n. 11) and the former is comprehended within the latter terminology herein.

[3] Appellant's *Agricultural commodities* certificates were all initially issued in the late 1930's and early 1940's at a time when the Commission interpreted the unmanufactured agricultural commodities exemption to apply only to a vehicle which never at any time handled any nonexempt commodities (J.S. App. 74-75). Under the Commission's construction at that time it was necessary for a carrier to have a certificate covering the commodities otherwise embraced within the exemption as long as the carrier used the same vehicle for handling nonexempt commodities whether or not the exempt and nonexempt commodities were in a mixed load.

The Commission had no occasion to consider the status of any frozen fruits or vegetables under the exemption or any certificate theretofore issued prior to its split decision in 1944 in *Newton, Extension-Frozen Foods*, 43 M.C.C. 787. The Commission's majority held in the *Newton* case that frozen fruits and vegetables were not unmanufactured agricultural commodities and thus not

Appellant's *Agricultural commodities* certificates was equivalent to the unmanufactured agricultural commodities exemption, definitive interpretations of commodities included within the exemption applied equally to Appellant's *Agricultural commodities* certificates. Findings by this Court and others (J.S. 5) that frozen fruits, vegetables and berries were within the exemption applied with equal force to the scope of Appellant's certificates. Neither the Government [3] nor the lower court [4] doubted

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within the exemption or Appellant's *Agricultural commodities* certificates. The *Newton* case did not turn not upon any finding of specific intent relating to any frozen commodities at the time of initial issuance of Appellant's certificates. Quite the contrary, the Commission there recognized, at 788: "Fresh frozen fruits and vegetables, as described in this record, are of relatively recent appearance on the market." The majority's decision in the *Newton* case turned upon its view that these frozen fruits and vegetables were (at 789) "subjected to a process of manufacture . . ." and thus not within the unmanufactured agricultural commodities exemption. Since Appellant's *Agricultural commodities* certificates were equated with the scope of the exemption, the majority held that additional authority was required and granted Appellant limited frozen food authority. Needless to say, the frozen food authority held by Appellant is far less encompassing than its *Agricultural commodities* certificates or Appellant would not have cause to contest the restrictive construction of the latter.

[3] In its brief to the lower court the Government stated (at 20):

> "In keeping with the purpose for which such certificates were issued, the Commission followed the general policy of construing the commodity description 'agricultural commodities' to embrace the same commodities as were covered by the Section 203(b)(6) exemption. *E.g., Penn-Dixie Lines, Inc., Extension*, 78 M.C.C. 188 (1958). Because of the conflicting Commission decisions, court decisions, and statutory amendments, the scope of that exemption at times assumed an accordion-like character, expanding or contracting as far as various specific commodities were concerned. *The certificates, of course, expanded and contracted accordingly.*" (emphasis added).

[4] The majority of the lower court observed (J.S. App. 79):

> "We find some difficulty in accepting the Commission's interpretation that the scope of the 'agricultural commodities'

the reasonableness of this position. In sum, therefore, the Commission's finding of specific intent was clearly erroneous and may not be used as a means for narrowing Appellant's certificates. Cf. *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, at 558-59, n. 4.

Since Appellant's *Agricultural commodities* certificates included frozen fruits, vegetables and berries prior to, and without consideration of, the Transportation Act of 1958, it follows that these certificates must today include those same commodities unless their scope was narrowed by the 1958 Act.[5] Since Section 7(b) of the 1958 Act (J.S. 20-21) expressly saved preexisting certificates covering "property made subject to" regulation by Section 7(a) (including thereby frozen fruits, vegetables and berries),[6] it would seem beyond dispute that the 1958 Act expressly saved Appellant's *Agricultural commodities* certificates. However, the lower court (J.S. App. 79-81) and the Government (G.M. 10) disregard the plain meaning of the statute. Their conclusion that Appellant's *Agricultural commodities* certificates are not embraced within Section 7(b) is premised upon distinctions which are not apparent in the terms or legislative history of the 1958 Act and which require emasculation of Section 7(b). Cf. *United States* v. *Menshe*, 348 U.S. 528, at 538-39.

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class remains fixed as of the time of issuance of such a certificate."

However, the lower court found it unnecessary to resolve this issue (J.S. App. 79), "[a]ssuming *arguendo* that frozen fruits, berries and vegetables are included [within Appellant's *Agricultural commodities* certificates]. . . ."

[5] The Commission cannot narrow the scope of outstanding certificates without observing statutory standards and procedures not here involved. *Watson Bros. Transportation Co.* v. *United States*, 132 F. Supp. 905 (D.C. Neb. 1956), aff'd *per curiam*, 350 U.S. 927.

[6] *Milk Transport, Inc.* v. *United States*, 190 F. Supp. 350 (D.C. Minn., 1960), aff'd *per curiam*, 368 U.S. 5.

The lower court appears to base its conclusion upon two subsidiary findings (J.S. App. 79-81): (1) that Section 7 of the 1958 Act affected only property previously exempt; and (2) that only mixed loads were exempt prior to the 1958 Act. However, the lower court's conclusion does not follow from these subsidiary findings but only from their erroneous application. There is nothing in the terms of the 1958 Act or in its legislative history to suggest that Congress was distinguishing the status of types of *shipments* of the same commodity. If such a distinction in fact existed, then Section 7(b) could not have "saved" the right of any certificate respecting straight loads, since immediately prior to the 1958 Act no certificate, however framed, covered a straight load shipment of frozen fruits, vegetables or berries.[7] Moreover, if Section 7(b) only "saved" the shipments which were formerly covered by a certificate, then at least the right to handle mixed loads must have been saved despite the lower court's unexplained conclusion to the contrary respecting Appellant's *Agricultural commodities* certificates.[8]

B. The "transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of [the applicant] to perform the services"[9] are matters properly to be considered in determining a "grandfather" application under Section 7(c) of the Transportation Act of 1958. These factors

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[7] The basis for the lower court's finding (J.S. App. 80) that the Commission correctly found Appellant's "general commodities" and "frozen foods" certificates were saved by Section 7(b) because these certificates "authorize the transportation of 'property made subject to' the Interstate Commerce Act" is unclear to Appellant.

[8] As already noted (note 2, *supra*) Appellant's *Agricultural commodities* certificates were, in fact, issued to cover both straight and mixed loads of unmanufactured agricultural commodities.

[9] *Willis Shaw Frozen Express, Inc.* v. *United States*, 377 U.S. 159 D-160.

are also of obvious import to a proper determination of public convenience and necessity under Section 207(a) of the Interstate Commerce Act where the applicant is a carrier already in the field. Cf. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236.

Here, Appellant's evidence included not only its existing authority and actual past operations but also the testimony of supporting processors who had long utilized *Appellant's* service. This supporting testimony attested to Appellant's past holding out and service throughout the territory involved, responsive to the shifting origins and destinations, the future continuing and expanding need for Appellant's service, and the adequacy of existing service only if Appellant's service was included. However, except for limited purposes the Commission put aside this evidence in determining the "grandfather" application [10] and denied the public convenience and necessity application because the evidence failed to show that existing service was inadequate.[11] The lower court, despite its exhaustive consideration of the evidence of the past shipments handled by Appellant, summarily dismissed this supporting evidence in considering the "grandfather" application (J.S. App. 85-86, 92 n. 19) and found support for the Commission's denial of the public convenience and necessity application in its findings that existing services were not shown to be inadequate (J.S. App. 96-99). The lower court stated (J.S. App. 96):

> A basic ingredient in the determination of public convenience and necessity is whether the existing facilities are adequate to meet the present or future transportation requirements.

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[10] The Commission considered this evidence only in determining whether to treat the commodities involved as a single class and in considering the base area granted. (J.S. App. 63-64, 66).

[11] (J.S. App. 66-68). By comparison, the Commission in an earlier Report granted substantial authority despite the absence of a showing of inadequacy. (J.S. App. 31-32).

By thus relegating the supporting testimony to public convenience and necessity issues and applying a severe adequacy of service standard, the Commission has entered findings, approved by the lower court, which would severly curtail Appellant's future operations and its ability to continue to be responsive to the transportation requirements of the involved shippers. The adequacy of service standard employed and approved by the lower court in determining public convenience and necessity issues is in conflict with decisions in other courts considering comparable circumstances. *Nashua Motor Express, Inc.* v. *United States*, 230 F. Supp. 646 (D.C. N.H., 1964); *Bowman Transportation, Inc.* v. *United States*, 211 F. Supp. 354 (D.C. Ala., 1962); *Dixie Ohio Express, Inc.* v. *United States*, 263 F. Supp. 993 (D.C. Ohio, 1966). Recent application of an adequacy of service standard to set aside a Commission grant of authority enabling new competitive service is otherwise being contested by the Government before this Court.[12]

[12] *United States et al.* v. *Dixie Highway Express, Inc. et al.* No. ——, October Term, 1967, on appeal from United States District Court for the Southern District of Mississippi, Eastern Division, *sub nom. Dixie Highway Express, Inc., et al.* v. *United States et al.*, 268 F. Supp. 329 (1967)—date for docketing appeal extended to October 8, 1967.

CONCLUSION

It is respectfully requested that Appellees' Motion to Affirm be denied and that plenary consideration of the issues be afforded.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

LESTER C. NEWTON TRUCKING CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

No. 328. Decided October 16, 1967.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE would note probable jurisdiction and set the case for oral argument.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.